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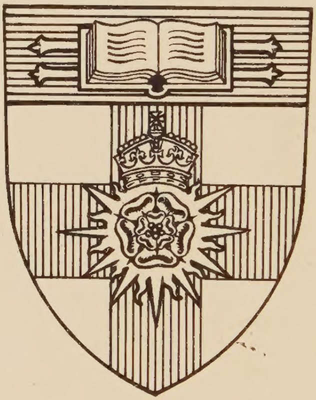

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PREFACE

THIS Preface covers the volumes of the *International Law Reports* for 1953 and 1954. These volumes are appearing simultaneously in partial fulfilment of the plan, previously announced, to narrow the gap between the date of the decisions reported and that of the publication of the *International Law Reports*. It is proposed to publish—in the first half of 1958—a volume covering the year 1955. A gap of some two years there must always be, having regard to the degree of availability of reports of the decisions rendered in various countries and the time consumed by the process of publication.

The fulfilment of the plan to bring the *International Law Reports* up to date has been made possibly mainly owing to the assistance, on a generous scale, of the Ford Foundation. The Advisory Committee and the Editor have much pleasure in recording their sense of gratitude to the Trustees of the Ford Foundation.

They also express their warm thanks for the assistance received from the International Law Fund in the United Kingdom.

As in all previous volumes, I wish to express my deep appreciation to the Contributors, who bear the main burden of preparation of these volumes. My gratitude to them is in no way diminished by the fact that on occasions, notwithstanding laborious efforts, they are unable to send a contribution for the simple reason that there were no decisions bearing upon international law in their country in the year under review.

Owing to circumstances outside the control of the Editor it has proved impossible to report in these volumes decisions of Italian courts given in 1953 and 1954. It is hoped to include them in the volume covering the year 1955.

As in the past, I am deeply indebted to Lord McNair, Chairman of the Advisory Committee, for his help and advice in matters both of detail and of general policy—advice which I have found particularly useful when taking decisions concerning the inclusion or omission of cases of a marginal nature.

Mrs. Gladys Lyons, B.Sc.(Econ.), continued her valuable assistance by reading the proof of these two volumes and seeing them through the press. Mr. A. B. Lyons, M.A., LL.B., in addition to giving welcome assistance as a contributor, undertook the task of preparing the Indexes. Mrs. E. E. Jansen compiled the Tables of Cases and gave devoted secretarial help. To all of them I express my sincere thanks.

I also wish to acknowledge the efficient co-operation and courtesy of the publishers, Messrs. Butterworth & Co., and their printers and compositors.

H. LAUTERPACHT

CAMBRIDGE
August 1957

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LIST OF ABBREVIATIONS

OF TITLES OF COLLECTIONS OF DECISIONS, LAW REPORTS, PERIODICALS, ETC., QUOTED IN THE TEXT

A.C. =British House of Lords and Judicial Committee of the Privy Council.

A.I.R. =The All India Reporter.

All E.R. =The All England Law Reports.

A.L.R. =American Law Reports.

Annual Digest =Annual Digest and Reports of Public International Law Cases.

App. Div. =Supreme Court Reports (New York), Appellate Division.

BGHSt. =Entscheidungen des Bundesgerichtshofes in Strafsachen (Germany).

Cal. 2d =California Law Reports (United States), Second Series.

Ch. (or Ch.D.) =Chancery Division of the English High Court of Justice.

C.L.R. =Commonwealth Law Reports (Australia).

Clunet =Clunet, Journal du Droit International.

C.M.R. =Court Martial Reports (United States).

Ct. Cl. =Court of Claims Reports (United States).

Dalloz =Recueil périodique et critique de Jurisprudence, de Législation et de Doctrine (founded by Dalloz) (merged with Sirey, 1955).

Dalloz et Sirey =Recueils Dalloz et Sirey de Doctrine, de Jurisprudence et de Législation (1955–/current).

D.L.R. =Dominion Law Reports (Canada).

F. (or Fed.) =Federal Reporter (United States).

F. 2d =Federal Reporter (Second Series).

F. Supp. =Federal Supplement (United States).

I.C.J. Reports =International Court of Justice, Reports of Judgments, Advisory Opinions and Orders.

I.L.R. =India Law Reports.

JZ =Juristenzeitung (Germany).

K.B. (or K.B.D.) =King's Bench Division of the English High Court of Justice.

L.Ed. =Supreme Court Reporter, Lawyers' Edition (United States).

L.N.T.S. =League of Nations Treaty Series.

L.T.[R.] =Law Times [Reports] (England).

Misc. =New York Miscellaneous Reports.

M.L.J. =Madras Law Journal.
M.L.R. =Malayan Law Reports.
N.E. =Northeastern Reporter (United States).
N.J. =Nederlandse Jurisprudentie (Holland).
NJW =Neue Juristische Wochenschrift (Germany).
N.L.R. =Natal Law Reports
N.W. =North Western Reporter (United States).
N.Y.S[upp]. =New York Supplement.
ÖJZ =Österreichische Juristenzeitung.
P. 2d =Pacific Reporter (United States), Second Series.
P. (or P.D.) =Probate, Divorce and Admiralty Division of the English High Court of Justice.
Pak.L.R. (or P.L.R.) =Pakistan Law Reports.
P.C.I.J. =Publications of the Permanent Court of International Justice: Reports of Judgments, Advisory Opinions, Orders, and Other Acts and Documents.
Q.B. (or Q.B.D.) =Queen's Bench Division of the English High Court of Justice.
Recueil des Décisions =Recueil des Décisions de la Commission de Concilation Franco-Italienne (under Article 83 of the Peace Treaty with Italy, 1947).
R.G.Z. =Entscheidungen des Reichsgerichts in Zivilsachen (Germany).
R.S.C. =Rules of the Supreme Court, 1883, as subsequently amended (England).
RzW =Neue Juristische Wochenschrift. Rechtsprechung zum Wiedergutmachungsrecht (Germany).
S.A. (or S.A.L.R.) =South African Law Reports.
S.Ct. (or Sup. Ct.) =Supreme Court Reporter (United States).
Settlement of Claims, 1949–1954 =Settlement of Claims by the Foreign Claims Settlement Commission of the United States and its Predecessors from September 14, 1949, to March 31, 1955.
Sirey =Recueil général des Lois et des Arrêts (founded by Sirey) (merged with Dalloz, 1955).
Staatsblad =Official Journal (Holland).
SZ =Sammlung der Entscheidungen des Obersten Gerichtshofes in Zivil- und Justizverwaltungssachen (Austria).

Tijdschrift =Nederlands Tijdschrift voor Internationaal Recht (Netherlands International Law Review).
T.L.R. =Times Law Reports.
U.N.T.S. =United Nations Treaty Series.
U.S. =United States Reporter (Supreme Court).
U.S.C.A. =United States Code Annotated.
U.S.C.M.A. =United States Court of Military Appeals Reports.
VwGH(A) =Erkenntnisse und Beschlüsse des Verwaltungsgerichtshofes, New Series (Administrative Law) (Austria).
W.L.R. =Weekly Law Reports (England).

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  ii. Of Neutral Merchantmen.
III. Restrictions on the Right of Capture (Hospital Ships, etc., Postal Correspondence, Property under Neutral Flag).
IV. Prize Law—
  i. Nature and Extent of Jurisdiction of Prize Courts.
  ii. Procedure.
  iii. Indemnities and Damages.

D. CONTRABAND

I. Conception of Contraband. Absolute and Conditional Contraband.
II. Carriage of Contraband and Doctrine of Continuous Voyage.
III. Penalty for Carriage of Contraband.

E. BLOCKADE

I. Establishment of Blockade. Conditions of Validity.
II. Breach and Penalty.
III. Blockade and the Doctrine of Continuous Voyage.

F. AIR WARFARE

G. NEUTRALITY

I. Nature and Duties of Neutrality.
II. Neutral and Military and Naval Operations and Preparations.
III. Neutral Asylum.
IV. Supplies, Loans and Services to Belligerents.
V. Effect of the Charter of the United Nations.

PART I

INTERNATIONAL LAW IN GENERAL

IV.—Relation to Municipal Law

[*See also* PART VIII, TREATIES: IX, Operation and Enforcement of Treaties, Necessity for Municipal Legislation; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

International Law—Relation to Municipal Law—Superiority of Treaties over Conflicting Municipal Law—The Law of Brazil.

FEDERAL GOVERNMENT *v.* COMPANHIA DE RADIO INTERNACIONAL DO BRASIL.

Brazil, Supreme Court. August 21, 1951.

THE FACTS.—The Companhia de Rádio Internacional do Brasil, a corporation with its head office in Rio de Janeiro, filed a suit against the Federal Government in order to secure the reimbursement of a certain sum, plus interest and costs, in respect of excise tax levied from the Company. The Court of first instance held for the plaintiff Company, on the ground that, in view of the Treaty concluded between Brazil and the United States of America on February 2, 1935, then in force, the Brazilian Decree-Law of March 22, 1945, which imposed the tax in question, could not be applied to the Companhia de Rádio Internacional do Brasil. That Treaty provided that certain articles, enumerated and described in the Treaty, should be " exempt from any national or federal internal taxes, fees, charges or exactions other or higher than those imposed or required to be imposed by laws of the United States of Brazil and the United States of America, respectively, in effect on the day of the signature of this Agreement, subject to constitutional requirements."

Held: that the appeal must be dismissed. The action turned on the supremacy of the international treaty over a municipal enactment. The latter could not prevail over the former. In the view of the Rapporteur, adopted by the Court, " the treaty revokes the laws previously enacted, but it cannot be revoked by subsequent legislation. . . . Therefore, a mere Act which provides for the levying of excise tax cannot alter the provisions of an international treaty."

[Report: *Revista de Direito Administrativo*, vol. 34, October-December 1953, p. 106.]

International Law—Relation to Municipal Law—Recognition of Acts of Foreign Governments Contrary to International Law—Expropriation without Compensation—Nationalization.

See p. 316 (*Anglo-Iranian Oil Co.* v. *Jaffrate and Others* (*The Rose Mary*)).

International Law—Relation to Municipal Law—Recognition of Acts of Foreign Governments Contrary to International Law—Expropriation without Compensation—Nationalization.

See p. 305 (*Anglo-Iranian Oil Company* v. *Idemitsu Kosan Kabushiki Kaisha*).

International Law—Relation to Municipal Law—Interpretation of Statute Consistently with International Law—International Maritime Law—Exterritorial Effect of Legislation Relating to Seamen.

See p. 197 (*Lauritzen* v. *Larsen*).

International Law—Relation to Municipal Law—The United States of America—Human Rights Provisions of Charter of United Nations.

See p. 244 (*Rice* v. *Sioux City Memorial Park Cemetery*).

International Law—Relation to Municipal Law—Subordination of Jurisdiction of Municipal Courts to Treaty Obligations—Revised Convention of Mannheim, 1868.

See p. 164 (*Swiss Corporation Tanutra* v. *Nederlandsche Rijnvaatvereeniging*).

International Law and Municipal Law—The Law of Israel.

See p. 153 (*Silberwacht* v. *Attorney-General*).

International Law—Relation to Municipal Law—Treaty not Submitted by Government for Parliamentary Approval—Resulting Inability of Individuals to Enforce Claims under Treaty—Whether Government Liable to Individuals for Failure to Submit Treaty to Parliament—The Law of Austria.

See p. 433 (*Irresberger* v. *Republic of Austria*).

International Law—Relation to Municipal Law—Treaties—Supremacy of Subsequent Municipal Law.

See p. 328 (*Compulsory Acquisition* (*Greece*) *Case*).

PART II

STATES AS INTERNATIONAL PERSONS

A—IN GENERAL

II.—Sovereignty and Independence

ii.—In Matters of Domestic Jurisdiction

Sovereignty—In Matters of Domestic Jurisdiction—Divisibility of Sovereignty—Exterritorial Jurisdiction—The Former Indian States.

R.S.B. Singh and Another *v.* State of Vindhya Pradesh.

India, Supreme Court. May 22, 1953.

(Patanjali Sastri C.J., Mukherjea, Bose, Gulam Hasan and Jagannadhadas JJ.)

The Facts.—The appellants were tried for various offences by a Special Judge in the State of Vindhya Pradesh. This State consisted of a number of pre-existing Princely States which after the Independence of India in 1947 formed a new entity within the Dominion of India. Some of the acts connected with the offences were committed by the appellants outside the territory of the State, and the question arose whether they were offences under Vindhya Pradesh law and whether they were triable in Vindhya Pradesh Courts. The appellants having been convicted, they appealed to the Supreme Court.

Held: that " Rulers of the Native States had prior to 1947 the authority to pass exterritorial laws relating to offences committed by their own subjects and vesting in their own Courts the power to try them, except where the contrary is made out by evidence in the case of any individual State . . ."

The Court continued: " In the present case we are concerned only with that portion of the relevant extraterritorial law which renders an act committed by a subject of the State outside the limits of the State an offence triable by the Courts of the State. In the course of the arguments it has been suggested that to that limited extent no question of extraterritoriality of the relevant legislation arises. But the concept of extraterritorial legislation appears to comprehend such cases also, if the passages relied on before us from Pitt-Cobbett's *International Law*, 5th ed., pp. 216, 225, 226 (paras. 101, 102) are to be accepted as correct. Assuming without deciding that this is so, the argument has been advanced that no Ruler of the Indian States before August 15, 1947, and much less the Rajpramukh of Vindhya Pradesh (composed of former Princely States), had any such full sovereign status as to entitle them to pass extraterritorial laws. It is well known that these Rulers had no external sovereignty, as it was taken [from] them and exercised by the suzerain British Power. But for internal purposes or municipal purposes the Rulers were generally considered as having full sovereign status except to the extent that the suzerain Power assumed to itself any function of such internal sovereignty either on specific occasions or generally, but for specified and limited purposes. In their relation with the Rulers of the Native States the suzerain British Power acted on the juristic theory propounded by Sir Henry Maine that ' sovereignty is divisible though independence is not '.

[After quoting certain passages from Ilbert's *Government of India* and Lee Warner's *Protected Princes of India* on the internal sovereignty of Indian Rulers, the Court went on:] " These passages, while showing that the extent of the exercise of internal sovereignty by each of these Rulers in actual practice is a matter for evidence, when called in question, indicate that full jurisdiction over the Rulers' own subjects was never denied but generally conceded, except where a sentence of death was involved. There is, therefore, no reason at all to think that the Rulers had no authority to pass laws binding their own subjects and regulating their own Courts in respect of acts committed outside their State, assuming such laws to be extraterritorial." The Court concluded, *inter alia*, that " The law relating to the offence committed by the first appellant outside the State of Vindhya Pradesh (at New Delhi) was perfectly within the competence of the appropriate legislative authority at the relevant time."

[Report: A.I.R., 1953, Supreme Court 394.]

States—Sovereignty of—Partition of India—Accession of Indian Ruler to the Dominion of India—Lapse of Paramountcy—External, Internal and Residuary Sovereignty.

MAGHER SINGH AND OTHERS *v.* PRINCIPAL SECRETARY OF THE JAMMU AND KASHMIR GOVERNMENT.

India, High Court of Jammu and Kashmir. March 25, 1953.
(Wazir C.J. and Shahmiri J.)

THE FACTS.—In this appeal the appellants sought a declaration that the Jammu and Kashmir Big Landed Estates (Abolition) Act, 2007 [A.D. 1950] was invalid and that they and other land owners were in peaceful possession and enjoyment of their lands. The point for determination was whether the Act was *ultra vires* the Head of State of Jammu and Kashmir (Yuvarajh) who passed it in exercise of powers vested in him under s. 5 of the Jammu and Kashmir Constitution Act, 1996 [A.D. 1939] read with the appropriate Proclamation issued by the Maharaja of Jammu and Kashmir. It was contended that the latter, who had first been under the paramountcy of the British Crown, had, after executing the Instrument of Accession in favour of the Dominion of India in 1947, surrendered part of his sovereignty to the Dominion and was, therefore, a limited and subordinated sovereign and consequently could not transfer his legislative authority to the Yuvarajh.

Held: that the powers of legislation of the previous Ruler (Maharaja) and the Yuvarajh were within the residuary sovereignty of the State and were as valid and plenary as those of the British Parliament. They could not form the subject matter of judicial review, nor could they be impugned on any ground, as was urged by the appellants.

The Court said: " Previous to the partition [of India] there was no doubt that the Ruler of the Jammu and Kashmir State was under the suzerainty of the British Crown inasmuch as foreign relations were under the exclusive control of the Crown Representative. But in so far as the internal sovereignty of the Ruler was concerned, it was absolutely unlimited and there were no fetters on it . . . The territories comprised in the State of Jammu and Kashmir were vested in His Highness and governed by him and in his name, and all rights, authority and jurisdiction appertaining or incidental to the government of these territories were exercisable by His Highness . . . all legislative, executive and judicial powers of His Highness in relation to the State and its government were declared to be or to have always been inherent in and possessed by His Highness. In view of these clear provisions it is futile to argue that His Highness's powers to do what he pleased in relation to the State could be seriously questioned. So far as the internal sovereignty of the State was concerned, the powers of the Ruler were similar to those of the British Parliament.

" In this connection reference may also be made to a Full Bench judgment of the Pepsu High Court in *Gurdwara Sahib* v. *Piyara Singh*, A.I.R., 1953, Pepsu I (B), cited by the learned Advocate-General. It is stated therein that sovereignty of a State has two aspects, *i.e.*, ' external ' as independent of all control from without, and ' internal ' as paramount over all actions within. A State by ceding certain powers with regard to external affairs to another State does not cease to be sovereign if its powers with regard to internal matters remain unrestricted.

"While the Maharaja of Kashmir was under the paramountcy of the British Crown before the partition of India, from August 15, 1947, under s. 7 of the Indian Independence Act passed by the British Parliament, suzerainty of His Majesty over the Indian States lapsed and all functions exercisable by His Majesty at that date with respect to the State of Jammu and Kashmir, all obligations of His Majesty towards the Jammu and Kashmir State or the Ruler thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in relation to the State of Jammu and Kashmir by treaty or otherwise lapsed and the State became an independent and sovereign State in the full sense of international law. Thus . . . His Highness became an uncontrolled and absolute sovereign."

After stating that the Ruler acceded to the Dominion of India in 1947 and transferred jurisdiction in certain matters (including the exercise of rights of external sovereignty) to India, reserving to himself sovereignty in and over the State, the Court observed: "In view of this clear and express reservation we see that no change whatsoever was effected in the residuary sovereignty of the State or the power of its Ruler so far as the accession of the State to the Dominion of India was concerned . . . It is therefore clear that in spite of the State's accession to India His Highness retained his internal sovereignty and was free to do anything he liked within the sphere which was not covered by the ceded subjects. In this I am supported by a Full Bench ruling of the Pepsu High Court reported as A.I.R., 1953, Pepsu I (F.B.), in which it has been held that the State by ceding certain powers with regard to external affairs to another State does not cease to be sovereign if its powers with regard to internal matters remain unrestricted.

"It may be pointed out here that His Highness by proclamation of June 20, 1949, expressly ordained Shri Yuvarajh to carry on the government of the State and entrusted all his powers, rights and prerogatives to the Yuvarajh for that purpose. Shri Yuvarajh was therefore fully competent to exercise powers and prerogatives which were exercisable by His Highness himself [including the passing of the Jammu and Kashmir Big Landed Estates (Abolition) Act, which has been unsuccessfully impugned by the appellants]."

[Report: A.I.R., 1953, Jammu and Kashmir 25.]

iii.—Conduct of Foreign Relations. Conclusiveness of Statements of the Executive

Conclusiveness of Statements of Executive—Certificate as to Status of Foreign Consul—The Law of Israel.

See p. 391 (*Heirs of Shababo* v. *Heilen and Others*).

Conclusiveness of Statements of Executive—Foreign Office Certificate—Requested by Court to Confirm that Diplomatic Representative Entitled to Perform Consular Functions—The Law of Israel.

See p. 389 (*Landau* v. *Borwin*).

IV.—Recognition of Acts of Foreign States and Governments

[*See also below*, D, Recognition of States, Governments, Belligerency; *and* PART IV, JURISDICTION: I, TERRITORIAL.]

Recognition of Acts of Foreign States—Foreign Revenue Laws—Whether Enforceable by English Courts—Position of Commonwealth Countries—Whether Foreign Tax Provable in Liquidation of English Company—Effect of s. 302 of Companies Act, 1948.

In re DELHI ELECTRIC SUPPLY AND TRACTION CO. LD.

England, Court of Appeal. November 10, 1953.
(Evershed M.R., Jenkins and Morris L.JJ.)

THE FACTS.—The Delhi Electric Supply and Traction Co. Ld., an English company incorporated in the United Kingdom in 1916, ran an electricity undertaking in India; which undertaking was purchased by the Government of India in 1947, in accordance with an option contained in the original licence granted to the Company. The purchase money was remitted to England. In April 1947 an Act of the Indian legislature imposed a capital gains tax on profits such as that made by the Company as a result of this sale, which was for a sum over and above the book values of the capital. When, in 1949, the Company went into voluntary liquidation, the Government of India sought to prove in the liquidation in respect of assessments to income tax, including capital gains tax. The Liquidator rejected the proofs of debt on the ground that they were for foreign tax. His decision was upheld by Vaisey J, in an application under s. 307 of the Companies Act, 1948. The Government of India appealed.

It was argued for the appellant that the rule that the Courts will not enforce foreign revenue laws was subject to limitations in that it was open to review, that it did not apply to India, that it did not apply to a liquidation, and was excluded by s. 302 of the Companies Act, 1948, which provides:

> " Subject to the provisions of the Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities pari passu, and, subject to such application, shall unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company."

Held: that the claim of the Indian Government was unenforceable in England because of the rule that the English courts will not enforce the revenue laws of a foreign State; and for this purpose there was no valid distinction between foreign States and States in the British Commonwealth.

Evershed M.R. stated the facts, referred to certain sections of the Companies Act, 1948, and continued:

" The existence of the so-called rule in regard to collecting taxes claimed by foreign countries has undoubtedly been assumed for many years. According to Lord Tenterden, it is attributable in origin to Lord Hardwicke, as will later appear. What is perhaps remarkable, however, is the fact that though the rule has been referred to from time to time as being well established, it is only rarely and recently that its validity has been directly tested in cases which are at all comparable to the present, and it has never been directly tested in this court in such a case.

" The most recent case, in which the matter was directly in issue, was *In re Visser*, [1928] Ch. 877, before Tomlin J. The plaintiff in that action was the Queen of Holland and the defendants were executors of the deceased Visser. The action was, in form, an administration action as commonly experienced in the Chancery Division of the High Court. By the claim, the plaintiff asked for a declaration that she was a creditor of Visser's estate and for an account, and, if necessary, an order for the administration of the estate of the deceased person. An application was then made by the defendants to strike out the plaintiff's claim on the ground that it disclosed no reasonable cause of action by reason of the fact, as was alleged, that in the claim the plaintiff was seeking to enforce, whether directly or indirectly, a foreign revenue claim, the plaintiff being a foreign sovereign.

" The numerous cases to which we have been referred were referred to in the course of the argument in *In re Visser*, and Tomlin, J., stated his conclusions in the following terms: ' My own opinion is that there is a well-recognized rule, which has been enforced for at least 200 years or thereabouts, under which these courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States; and this is one of those actions which these courts will not entertain.' Having examined all the cases and such passages in the textbooks as have been referred to before us, I am of the same opinion as was Tomlin J. I think that the alleged principle is properly formulated in the way in which I have already stated it, namely, that the courts of this country will not, and cannot, be used as a means of collecting taxes imposed by another State. That convenient and, as I think, correct statement is derived from the reported argument of Mr. Simon K.C. in one of the two earlier cases in which the matter was directly in issue, namely, *Sydney Municipal Council* v. *Bull*, [1909] 1 K.B.

7, 9, before Grantham J. That was an action brought by the council directly against the defendant Bull, claiming local rates or local revenues. Mr. Simon is reported as having said: 'International comity does not extend to the recognition of liabilities imposed by a State on its subjects for its own domestic management and regulation.' The word 'subjects' must, I think, mean 'persons subject to its jurisdiction'. The argument goes on: 'For that reason the penal laws of a foreign country are not subject-matter of an action in this country.' Then he made a reference to Dicey on *Conflict of Laws*, 2nd ed., p. 220, r. 40, and continued: 'nor are suits for the recovery of penalties, pecuniary or otherwise, for any violation of statutes enacted by a foreign State for the protection of its revenue or other municipal laws.' Then comes the most significant sentence for present purposes: 'For the same reason the courts of one State cannot be used as a means of collecting the taxes imposed by another,' and Mr. Simon cited as authority in support of that proposition an American case, *Henry* v. *Sargent*, (1843) 12 New Hamp. 321, to which I shall have occasion to make some reference hereafter.

"On general principles both of justice and convenience there is, to say the least, much to commend the rule as I have stated it, though, undoubtedly, there may be hard cases, of which the present case may well be one. If there were no such rule the result, as it seems to me, would be that all revenue claims from other countries would become liable to be enforced here. That, however, is beside the present point. The question is, and this court is for the first time asked to re-examine the matter, what is the authority for the existence of this rule as I have attempted to formulate it? Of the two earliest cases to which we were referred, the first was *Attorney-General* v. *Lutwydge* (1729) Bunb. 280, 281 (referred to by Mr. Jennings). In that case the plaintiff was the English Attorney-General, and he sought to recover a sum alleged to be due upon a bond which was executed at Dumfries in Scotland. Lord Chief Baron Pengelly said: 'Before the union [of England and Scotland] this court had no jurisdiction of the revenues in Scotland.' I think that only means in its context that the court in England had no jurisdiction to collect revenues in Scotland for English purposes and doubt whether it has any bearing on the rule which we are now considering.

"Mr. Mustoe referred to *Boucher* v. *Lawson* (1734) Cas.t.Hard. 85. That was a case concerning the freight of certain goods, and the point which emerged was that the voyage had involved exporting gold from Portugal which, according to Portuguese law, was an illegal traffic. In the course of his judgment, Lord Hardwicke C.J. said: 'But if it should be laid down, that because goods are prohibited to be exported by the laws of any foreign country from whence they are brought, therefore the parties should have no remedy or action here, it would cut off all benefit of such trade from this Kingdom, which would be of very bad consequence to the principal and most beneficial branches of our trade.' When the matter was later before the court, Lord Hardwicke observed: 'I think the unlawfulness of the trade makes no difference, for it is not material to us what the law of Portugal is, but what the law of England is, and here in England it is not only a lawful trade, but very much encouraged.' Whether that case was cited because it was before Lord Hardwicke and was possibly the origin of Lord Tenterden's attribution of the relevant statement to Lord Hardwicke, I do not know; but I think that it has a remote bearing upon the present problem. Its consequence may be, as Mr. Mustoe naturally and properly stated, that the rule was derived from a desire not to hinder but rather to promote all forms of trading. In those days the revenue laws likely to be involved, if the rule existed, would not be those relating to what we now know as income tax (which had not then emerged upon the experience of mankind), but rather those relating to customs duties, which tended, no doubt, to interfere with trade.

"The first real statement of the rule is to be found in two cases before Lord Mansfield, *Holman* v. *Johnson*, (1775) 1 Cowp. 341, and *Planche* v. *Fletcher* (1779) 1 Doug. 251. In *Holman* v. *Johnson* the seller of tea, under a contract made with the buyer in Dunkirk, sued for the price. The buyer had, in fact, smuggled the tea into England, and it was proved that the seller knew when he made his contract that such was the intention of the buyer; but the seller was, himself, in no way implicated in, nor was he concerned with, the smuggling operations. The contract of sale made between him and the buyer in Dunkirk was such a contract as he might have made with any other buyer, whatever had been the later intention or activity of the buyer. For that reason it was held that the plaintiff was entitled to recover. But in the course of the judgment appears the classic statement of Lord Mansfield from which, according to the books as they are now available to us, everything else has flowed. The statement is: 'For no country ever takes notice of the revenue laws of another.'

"That statement was repeated almost in the same terms in the later case, *Planche* v. *Fletcher*. The facts of that case also were far removed from those of the present. It concerned the insurance of a ship which was intended to go, and did go, direct to Nantes, though it had been cleared to Ostend, it being the apparent but not the actual intention that the vessel should call at Ostend and not go direct to Nantes. That circumstance affected the customs duties which might be exacted. It was suggested that the sailing direct to Nantes was a fraud on the underwriters, but that suggestion was clearly rejected by Lord Mansfield, and in the course of his judgment he made use again of the formula: 'One nation does not take notice of the revenue laws of another.'

" Mr. Mustoe then referred to three cases which came before Lord Kenyon C.J., and it was part of his submission that Lord Kenyon did not accept Lord Mansfield's dictum, but proceeded upon some different principle. If that were so, it would no doubt weaken the authority of the original formula of Lord Mansfield. I am, however, of the opinion that there is no dissent between Lord Mansfield and Lord Kenyon. Indeed, as will appear in a moment, I think it is clear that Lord Kenyon accepted as established the rule which Lord Mansfield had formulated. The three cases are *Clugas* v. *Penaluna* (1791) 4 Term Rep. 466; *Bernard* v. *Reed* (1794) 1 Esp. 91; and *Waymell* v. *Reed* (1794) 5 Term Rep. 599. In *Clugas* v. *Penaluna* a contract had been made in Guernsey for the sale of brandy and gin to a buyer, but, unlike *Holman* v. *Johnson* 1 Cowp. 341, it was part of the bargain not only that the buyer should buy in Guernsey the brandy and the gin, but that the seller should participate in the operation of smuggling the brandy and gin into England; for it was part of the arrangement that the seller should pack the brandy and gin in a particular manner which was appropriate to the smuggling operation which was to follow. It was held, therefore, that the seller, being particeps criminis with the buyer, could not recover in this country; in other words, he could not set up the contract which disclosed his own wrong in being a party to the smuggling operation. Buller J. said: 'If goods be bona fide sold in Guernsey, and delivered there in the fair course of trade, the seller may recover the price of them here, though they be afterwards smuggled into this country. But here the plaintiff himself was assisting in the act of smuggling, by the means of packing the goods; for the spirits were delivered in ankers, which are used for the purpose of smuggling; and if he take part in the transaction, it taints the whole of it. And this distinguishes the case of *Holman* v. *Johnson* from the present.' The leading judgment of Lord Kenyon C.J. had been to the same effect. I should add that at the end of the report there is the observation by Lord Kenyon that this case was in other respects distinguishable from *Holman* v. *Johnson*.

" It seems to me that there is no question in *Clugas* v. *Penaluna*, 4 Term Rep. 466, of any reluctance or refusal on Lord Kenyon's part to adopt as a valid principle of law what Lord Mansfield had stated in the earlier cases.

" *Bernard* v. *Reed* is really to the same effect as *Clugas* v. *Penaluna*. In *Waymell* v. *Reed* Lord Kenyon in terms accepted and treated as good law the proposition which Lord Mansfield had earlier stated. He said: 'It is sufficient, in order to dispose of this case, to advert to the distinction laid down by Lord Mansfield in *Holman* v. *Johnson*, to which I entirely subscribe, that where the contract and delivery of goods are complete abroad, and the seller does no act to assist the smuggling them into this country, such a contract is valid, and may be recovered upon here. But here the plaintiff was concerned in giving assistance to the defendants to smuggle the goods, by packing them in the manner most suitable for, and with intent to aid, that purpose. He cannot, therefore, resort to the laws of this country to assist him in carrying his contract into execution. What was said by Lord Mansfield, at the end of *Holman* v. *Johnson* comes up to the present case.' Those three cases, therefore, cannot in my judgment be used to support the suggestion that there was any conflict between Lord Mansfield and Lord Kenyon, or that Lord Kenyon doubted the validity of the proposition which Lord Mansfield had enunciated.

"The next cases in the series are those relating to a specific matter of stamp duty, and they differ from the present in this respect. In the first, *Alves* v. *Hodgson,* (1797) 7 Term Rep. 241, it appears that the absence of a stamp on a contract made in a foreign country altogether invalidated the contract in that country, so that it could not be proceeded upon there or anywhere else. In two other cases, *James* v. *Catherwood* (1823) 3 Dowl. & Ry. 190, and *Bristow* v. *Sequeville* (1850) 5 Exch. 275, the evidence was that in the foreign country the absence of a stamp only affected the admissibility of the contract in evidence, as distinct from its validity; and it was, therefore, held that in this country, since the rules of evidence went according to the lex fori, there was nothing to prevent the admissibility of the contracts in evidence, notwithstanding the absence of stamps which would have made them inadmissible in the courts of the country of their origin.

"I shall not refer to *Alves* v. *Hodgson,* 7 Term Rep. 241, except to read what Baron Rolfe said about it when I come to the third of the cases, *Bristow* v. *Sequeville.* I have mentioned *James* v. *Catherwood* specifically because that was the case in which Lord Tenterden (then Abbott C.J.) attributed the origin of the rule, as I have earlier stated, to Lord Hardwicke. Abbott C.J. in his judgment said: 'This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord Hardwicke, that in a British court we cannot take notice of the revenue laws of a foreign State. It would be productive of prodigious inconvenience, if in every case in which an instrument was executed in a foreign country, we were to receive in evidence, what the law of that country was, in order to ascertain whether the instrument was or was not valid. Nothing must be taken by the motion.' The note of the reporter at the foot is: 'Vide *Holman* v. *Johnson,* where Lord Mansfield said: "no country takes notice of the revenue laws of another."' That statement of Abbott C.J. may, I think, be in some respect rather wide, but it does not matter for present purposes whether it is entirely correct or not.

"In the third case mentioned, *Bristow* v. *Sequeville* (which was, like the second, a case where the document, by reason of the absence of the stamp, was inadmissible according to the laws of the foreign country being the country of its origin) Baron Rolfe said about *Alves* v. *Hodgson* (the first case in this series of three): 'The marginal note of *Alves* v. *Hodgson* is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The marginal note is in these terms: "The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp." I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide, that where a stamp is required by the revenue laws of a foreign State before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree.'

"I have referred to those last three cases because it seems to me that, when examined, the only bearing which they have on the matter in hand is that they show that in certain circumstances the courts will 'take notice' of the revenue laws of a foreign country, in the sense that if the stamp laws of a foreign country affect the validity of the contract in the country of origin, then these courts may hold, as in *Alves* v. *Hodgson*, that no contract has been made which could be sued upon either in the foreign country or anywhere else. But those cases do not touch the question with which we are directly concerned, namely, whether the courts of this country can be used to collect revenue of another country, whether the revenue is imposed as stamp duty, income tax, customs duty, or in any other way.

"But I think that the matter goes further. Having looked at these cases, I think they show that a general rule in the form stated by Lord Mansfield (whatever may be its exact scope) was treated by lawyers in this country in the eighteenth century as well established. I think that it is equally clear that the rule has continued thenceforward to be accepted. As I have already said, its origin may well have had to do with questions of freedom of trade and the direct application to that problem of customs duties imposed by foreign countries. But that is no more than the accident of its birth, and does not affect the existence of the principle and its applicability to other forms of revenue which may from time to time emerge. I think, then, that these cases show that, though the full import of the words, 'no country ever takes notice of the revenue laws of another,' may require explanation or even qualification, the true rule, which was then regarded and should be now regarded as well established, is that claims by representatives of a sovereign foreign State to recover penalties or the revenues of that State will not be enforceable in these courts.

" I have used the two words ' penalties ' and ' revenue '. We have not in this case been concerned with penalties, but I observe that there is a certain affinity between the two. The distinction between that which is a penalty and that which is mere revenue may in some circumstances obviously be somewhat fine.

" The three instances when direct application of the rule came before the courts are much later in date. The first was a Scottish case, and though of course the law of Scotland is not the law of England, this rule, as will later appear, was always treated, and was stated by Lord Mansfield, as a rule of private international law. In any event, the courts of this country will always pay regard to the decisions of the Scottish courts. The case was *Attorney-General for Canada* v. *William Schulze & Co.* (1901) 9 Sc. L.T. 4. In that case certain goods of the defendant had been seized in Canada, and the Canadian courts had affirmed the validity of the seizure and ordered the defendant to pay costs incurred in the Canadian courts when the matter was there decided. The Attorney-General for Canada then sued the defendant in Scotland to recover the costs. It was contended by the defendant that the costs were vitally concerned with, and inseparable from, the penalty of the seizure and that, therefore, the suit would not be entertained by the Scottish courts. The Scottish courts held in favour of that contention.

" In *Municipal Council of Sydney* v. *Bull*, [1909] 1 K.B. 7, there was a claim made against Bull directly to recover local revenue charged by the Municipality of Sydney. The argument of Mr. Simon K.C., which I have already read, was accepted by Grantham J., and the suit was dismissed.

" In the third case, *In re Visser*, [1928] Ch. 877, to which I have already made reference, Tomlin J., at the beginning of his judgment, said: ' The short ground for the application [to strike out the statement of claim] is that these courts do not take notice of the revenue laws of a foreign State,'—and there Tomlin J. is quoting Lord Mansfield, ' and that the foreign State cannot sue in this country for the recovery of taxes falling to be paid under the foreign law '—the second part of the statement being the particular application of the general rule earlier stated. Tomlin J. observed that in Dicey's Conflict of Laws there appeared, for the first time in the 3rd edition published in 1922, the word ' revenue ' in addition to the word ' penalty '. It is significant that there was no new edition of Dicey before 1922 after the decision of Grantham J. in 1909 in *Municipal Council of Sydney* v. *Bull*. I shall refer to Dicey presently, but Tomlin J. in that part of his judgment accepted the revised statement of Dicey appearing in the third edition, as it has since appeared in later editions.

" Tomlin J. considered particularly the stamp duty cases, *Alves* v. *Hodgson*, *Clegg* v. *Levy* and *Bristow* v. *Sequeville*, two of which I have already mentioned, and said: ‘ They really turn upon this, that where you are suing on an instrument or contract—a foreign instrument or contract—you have established its validity according to foreign law, but if it is valid according to foreign law, it is none the less valid because of a provision of revenue law. If, on the other hand, the revenue law does not operate to invalidate the instrument, but only affects its admissibility in evidence, then it is plain, on *Bristow* v. *Sequeville*, that the instrument would be admissible in evidence in our law. Now that seems to me to be the explanation of those cases, and all that those cases do is to indicate that however unwilling the courts may be to recognize foreign law, there are certain cases in which, although they do not enforce the foreign revenue law, they are bound to recognize some of the consequences of that law—namely, those cases where, as one of the terms of the law, contracts are rendered invalid by the foreign law.’ Again I respectfully agree and adopt that conclusion of Tomlin J. upon those stamp cases.

“ The existence of this rule and its particular application to the recovery of revenue has since, as I think, been further recognized not only in the courts, but also by Parliament in this country. In *Kahler* v. *Midland Bank Ld.* [1948] 1 All E.R. 811, reference to the existence of the rule is to be found both in the judgments in this court and in the speeches in the House of Lords. The matter was not directly at issue and I do not, therefore, suggest that the references which I am about to make amount to more than dicta, but they are dicta of authority in these courts, and they recognize, as I have said, the existence of this rule and treat it as well-established. The plaintiff Kahler claimed to be entitled, as against the Midland Bank Ld., to certain securities. The Midland Bank Ld. was the bailee of those securities for a Czech bank, and the question was whether the Midland Bank Ld. could properly hand over the securities to the plaintiff. The answer to his claim was that they held them to the order of the Czech bank, and that any transfer out of the name of the Czech bank would involve an infringement of Czechoslovak currency laws, the contract relevant for consideration being held to be governed by Czech law; with the result, as this court and the House of Lords held, that the Midland Bank Ld. could not be required to do something which would involve an infringement of the law applicable to the contract on the part of the Czech bank. In the leading judgment in the Court of Appeal I said: ‘ It is, indeed, conceded that, save with the necessary permission, the Bohemian bank could not consent to the transfer of the securities in the defendants’ book from its own name to that of the plaintiff without a contravention on its part of the regulation to which the bank is subject, and, in my judgment, recognition of this fact does not amount to an enforcement of the “ revenue laws ” of another country. Assuming in the plaintiff’s favour that the currency regulations in question can properly be described as "revenue laws", it is, it seems to me, necessary for the plaintiff to show that the English courts will not in any circumstances "have regard to" such laws, even though it is not in any proper sense of the term "enforcing" them.'

"In the House of Lords, Lord Normand said, after referring to *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 2 K.B. 287; *sub nom. Sota & Aznar* v. *Ralli Bros.*, 36 T.L.R. 456: 'The principles on which they were decided is that the courts of this country will not compel the fulfilment of an obligation when performance includes the doing in a foreign country of something which the laws of that country make it illegal to do. But a judgment in rem compelling the delivery of securities held in London would not involve the doing of anything in a foreign country. I think that the dismissal of the appeal does not involve the enforcement of Czechoslovakia revenue laws or penal laws.' Lord Reid said (and it is not relevant for this purpose that Lord Reid's opinion was a minority opinion): 'In my judgment those regulations do not come within the category of confiscatory or fiscal legislation of a foreign country which English courts cannot recognize.' Finally, Lord Radcliffe said: 'I should not have been prepared to treat such currency regulations as we are concerned with here as if they were no more than the "penal or revenue laws" of another State the existence of which our courts are traditionally disposed to ignore.'

"In each of those citations it is, I think, plain that those from whose observations I have quoted are treating as a well-established axiom or principle of the law the principle formulated long ago by Lord Mansfield. But, as I have said, it is not merely recognition of the principle by the courts that is to be found in the books but recognition also, as I think, by Parliament. The Foreign Judgments (Reciprocal Enforcement) Act, 1933, was designed to enable persons who had obtained judgments in foreign countries with whom certain conventions had been made by His Majesty to enforce those judgments direct, that is to say, to execute them directly in this country without the necessity of obtaining first a judgment of the courts of this country. The kind of judgment which might be so enforced is defined or specified in section 1 (2) thus: 'Any judgment of a superior court of a foreign country to which this part of this Act extends, other than a judgment of such a court given on appeal from a court which is not a superior court, shall be a judgment to which this Part of this Act applies, if . . . (b) there is payable thereunder a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty.' There is a similar reference in section 10 in regard to the issue of certificates of judgments obtained in the United Kingdom with the object of obtaining reciprocity in the foreign country. The matter is stated thus: 'Where a judgment under which a sum of money is payable, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty, has been entered in the High Court . . .' I am not, of course, suggesting that that Parliamentary language carries the present question any further than this: that it is an apparent recognition by Parliament of the special category, to say the least, into which claims for revenue or penalties are traditionally regarded as falling in this country, and, I think that I may add, in other countries. I have indicated that the rule is not, as I follow it, merely a rule of English municipal law. It is treated also as a rule of private international law.

" With that introduction I refer to the passage in Dicey, 6th ed., p. 152, to which, in the 3rd ed., p. 230, Tomlin J. had referred in *In re Visser*: ' Rule 22. The court has no jurisdiction at common law to entertain an action—(1) for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.' In the comment which follows there is set out a statement of Lord Loughborough: ' The penal laws of foreign countries are strictly local, and affect nothing more than they can reach and can be seized by virtue of their authority; a fugitive who comes hither, comes with all his transitory rights; he may recover money held for his use, stock, obligations and the like—and cannot be affected in this country by proceedings against him in that which he has left beyond the limits of which proceedings do not extend. ' I read that passage as supporting the view which I have intimated, that there is a good ground in justice for a rule such as this, even though, as I concede, there may be, from time to time, and perhaps here is, a hard case to be found.

" The passage in Dicey, as I have said, was accepted by Tomlin J., and I also accept it. Its counterpart in American law is to be found in Beale's *Conflict of Laws* (1935), vol. 3, p. 1635, and in the case (*Henry* v. *Sargent*, 13 New Hamp. 321) to which Mr. Simon referred among others in *Municipal Council of Sydney* v. *Bull*, [1909] 1 K.B. 7, as establishing a formulation of the proposition which I adopt as correct. Beale refers first to the English decisions, at p. 1633, to which I have already made considerable allusion, and he then treats the matter as it has come before the courts in the United States, mentioning first *Henry* v. *Sargent*, 13 New Hamp. 321. The text of the book states:

> ' The American cases treating this problem begin with *Henry* v. *Sargent*. In that case action was brought against defendants, the selectmen of Chester Vermont, to recover a tax which was claimed to have been illegally assessed under Vermont law, and also to recover damages for causing the arrest of plaintiff for refusing to pay the tax. The New Hampshire Court examined the law of Vermont and gave judgment for plaintiff. Parker C.J. said: " It is said that the court will not enforce the penal laws, or the revenue laws, of another

> State. But this principle is not applicable in this case, nor can it be true to that extent. There is no attempt to enforce the penal or revenue laws of Vermont in this action. If there were, it would be held that this was not to be done through the instrumentality of the courts of another State; as, for instance, if the attempt was to collect a tax assessed in Vermont by a suit here." '

" The matter later came twice before the Circuit Court of Appeals in New York, and, as regards one of those cases, there is a citation of the basis of the rule by a very learned judge, Learned Hand J. He, concurring specially in the decision of the Circuit Court of Appeals, said:

> ' While the origin of the exception in the case of penal liabilities does not appear in the books, a sound basis for it exists, in my judgment, which includes liabilities for taxes as well. Even in the case of ordinary municipal liabilities, a court will not recognize those arising in a foreign State, if they run counter to the " settled public policy " of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic State.'

I have read that passage out of respect to Learned Hand J., but if that were the true basis of the rule, it would, beyond doubt, greatly limit its application. But as I understand the rule as applied in England, its origin is not of the limited character stated by Learned Hand J. However that may be, in the United States of America it is clear that the problem is apt to be, and frequently has been found to be, of a rather special character, because there the problem has arisen, as between States in the Union, whether there is an obligation upon the courts of one State to enforce the revenue claims or judgments of another State in the Union, having particular regard to Article 4 (1) in the Constitution of the United States, known as the ' Full faith and credit clause '. An example of that application of the problem came before the Supreme Court of the United States in *Milwaukee County* v. *M. E. White Co.* 296 U.S. 268. There the question was whether the courts of one State ought to give effect to a *judgment* for tax made in another State. Article 4 (1) of the Constitution is expressed thus: ' Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State.' It was held by a majority of the Supreme Court that, in the light of that provision, it was the duty of the State in question to give effect to the judgment for tax of another State, and the court expressly left open the question whether, either within or without the Union, the proposition that one State should not enforce the revenue claims of another State was to be treated as valid or not, and if not, to what extent.

" It seems to me that these citations provide formidable and weighty authority for the acceptance, at any rate in this court of the rule in the form in which I have stated it, and for the formulation of which I acknowledge my indebtedness to Lord Simon when at the Bar.

" Mr. Mustoe has contended that whatever might have been the political philosophy justifying such a rule two hundred years ago, it has become archaic in existing conditions and disregards the obvious fact that from time to time the courts of this country may have to consider and do consider in detail the revenue laws of other countries, particularly countries adhering to the British Commonwealth. Mr. Mustoe has gone further and said that he has found indications in the books that judges have expressed the view that the scope of the rule in modern times should be reviewed. By way of example, he referred to *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [1950] A.C. 24. That was a case which involved the application of the principle which Lord Normand stated in a passage in the speech which I have already read, namely, that the courts of this country will not enforce a contract the performance of which, according to its terms, in a foreign country will be illegal in that place of performance. Scrutton L.J. said:

> ' In my opinion the law is correctly stated, by Professor Dicey in Conflict of Laws, 2nd edition, p. 553, where he said: " A contract . . . is, in general, invalid in so far as . . . the performance of it is unlawful by the law of the country where the contract is to be performed "—and I reserve liberty to consider whether it is any longer an exception to this proposition that this country will not consider the fact that the contract is obnoxious only to the revenue laws of the foreign country where it is to be performed as an obstacle to enforcing in the English courts. The early authorities on this point require reconsideration, in view of the obligations of international comity as now understood.'

Any observations of Scrutton L.J. deserve, and invariably obtain, the greatest consideration; but in my judgment what was in his mind was the broad scope which the words, unqualified and unexplained, of Lord Mansfield might bear; and he was not intending in any way to throw doubt upon the validity of the more limited proposition that the courts of this country will not be used as a means of collecting the revenue of a foreign country. Indeed, as I have already mentioned, in *Kahler*'s case in 1950, three members of the House of Lords obviously regarded that more limited principle as being well established.

" If, then, the rule be well established and be correctly stated in the way I have stated it, what is the effect of section 302 of the Companies Act, 1948, which says that the property of the company shall be applied in paying all liabilities? It is said that that section requires every liability to be provided for, including a liability for tax due in a foreign country, particularly in a foreign country where the company has been trading and has earned the money in respect of which tax is assessed. It is said that that is so because, according to ordinary language and the ordinary interpretation of the section, such a claim as that with which we are concerned is a liability, notwithstanding the rule to which I have referred, and notwithstanding that it may be the fact that the Government of India may not, under the rule, be able to come to this country and directly sue to recover the sum due.

" I am unable to accept that view of section 302. In my judgment, and allowing for the fact that ' liability ' is a word of the widest import, and was deliberately used accordingly (see, for example, what Pearson J. said in *Gooch* v. *London Banking Association*, (1885) 62 Ch.D. 47), if a liability or an obligation such as that with which we are here dealing, is within the section, then it will follow that the liquidator has a statutory duty: he is, as has been said, a trustee under the statute in favour of the Government of India as a creditor. In other words, acceptance of the proposition that this claim is a ' liability ' within section 302 is inevitably acceptance also of the proposition that the claim is one which is enforceable in these courts by the Government of India, for the liquidator could then, and on this hypothesis, at the suit of the Government of India be compelled to give effect to the statutory duty or statutory trust in favour of the Government of India. I cannot accept the proposition that the liquidator ought to be treated as a trustee quoad the amount here claimed for the Government of India, while at the same time accepting the view that the Government of India could never as cestui que trust, or otherwise, enforce its claim. That seems to me to lead to an absurd conclusion.

" Put, then, in another way, I think that the present claim made in accordance with the procedural provisions of section 307 of the Companies Act, 1948, is in substance and effect, though not perhaps in form, a proceeding to enforce, or to attempt to enforce, payment of the tax which the Government of India alleges to be due to it. In that connexion, I think, it is not irrelevant to observe that under the original counterpart of section 307, namely, section 138 of the Companies Act, 1862, it was not open to a creditor to make an application, though the liquidator or a contributory could do so in a form such as the present application. A creditor would have had to bring an action to recover his claim against the company, or I assume, if the liquidator had parted with the money, against the liquidator. He cannot now effectively bring any proceeding in that form, or if he did, it would inevitably fail. The difference, I think, is merely procedural. The substance of the matter is the same. The Government of India, claiming to be a creditor, is, by these means, which are the only means available to it, seeking to enforce the claim.

" The result, in my judgment, is that, construing ' liabilities ' as I do, in the widest sense, so as to include present, future, and contingent liabilities, I think that it must nevertheless be construed so as to exclude claims which are not enforceable, according to the laws of this country, in the courts of this country. After all, by the terms of the Act, there is here an estate being administered, and prima facie, where an estate is being administered whether it be the estate or property of a company in liquidation or the estate of a deceased person, the rules governing the administration will be the rules applied by the lex fori, that is, the laws of the country where the property is being administered.

" Thus, I think, there is a true and valuable analogy to be found by considering the case of a debt which is statute-barred according to the laws of this country. Wynn-Parry J., in *In re Art Reproduction Co. Ld.*, [1952] Ch. 89, decided that a liquidator in a voluntary winding-up of a solvent company could not pay a statute-barred debt without the consent of the contributories. We are not at the moment concerned, of course, directly with that matter, but I have always understood that statute-barred debts are not provable in the liquidation of a company. For the moment, however, I refer to this matter of statute-barred debts by way of analogy, and I have found assistance for present purposes in *In re Lorillard,* [1922] 2 Ch. 638. The facts of that case were of a rather special character. A testator was domiciled in New York, but died in England, and he left assets and creditors in both countries. The principal administration was in the United States, but there was also administration of his estate in England, the English administration being, as was stated, ancillary to the American. It appears that the English administrator had discharged all the debts and had in hand a surplus which he was proposing to distribute among the English beneficiaries. The American estate was, however, less ample, and it had been exhausted without paying all the American creditors, in particular (and this is the significance of the case) without paying certain American creditors whose claims were good in America but which were bound to be defeated if prosecuted in England because they were barred here by the English Statute of Limitations. Two summonses were brought before Eve J. The first summons was by the administrator in England for directions as to what he should do with the surplus. It was asked whether he ought to pay it to the English beneficiaries, or whether he was precluded from doing that by the fact that he had notice of these creditors in America, even though they had deliberately abstained from trying to prove in the English administration. The second summons was a summons issued by the American administrator asking that the balance in the English estate might be ordered to be handed over to him. Eve J. treated the matter as one in his discretion whether he should order the English administrator to hand over the surplus to the American administrator, and, in his discretion, he answered the question negatively. The Court of Appeal expressed the view that there was no reason to interfere with the exercise of his discretion. But the significance of the matter is that in the judgments of Lord Sterndale M.R. and of Younger L.J. can be found references to the situation and rights quoad the English estate of these American creditors. Thus, Lord Sterndale said:

> ' There are debts in America which according to English law are statute-barred, but not so according to the law of New York. If claims in respect of these debts had been made here they would rightly have been rejected.'

Then again later:

> ' The American creditors, however, did not present their claims, presumably knowing that if they did so they would be rejected.'

Younger L.J. said:

> ' The only persons whom the American administrator claims to represent, the so-called American creditors, would, if they brought in their claims in this country, be defeated by the statute.'

Those remarks were directly relevant to the decision, because on the basis of those statements the judges in this court were saying: ' Although the administrator here has notice of these claims they are not enforceable here, and therefore he has no duty towards these American creditors.' That was a clearly relevant consideration in deciding whether this court would vary Eve J.'s decision when he directed the English administrator not to pay over to the American administrator but to hand over the surplus assets to the English beneficiaries. I find that case of assistance as indicating that in the administration of any estate, whether it is the property of a company in liquidation, or the estate of a deceased person, the question how it should be administered and, in particular, what liabilities ought to be accepted and discharged is prima facie a matter to be dealt with by the lex fori, that is, by the law of England.

" Mr. Mustoe submitted that, even if the rule which found expression in *In re Visser* [1928] Ch. 877, is well established as a rule of common law, the effect of the Companies Act, 1948, and its deliberate use of the wide word ' liabilities ' was, for the purpose of that Act, to override the common law rule. He cited *Canadian Pacific Railway Co.* v. *Roy*, [1902] A.C. 220, which is an illustration of the well-known proposition that a corporation (for example, a local authority in common instances) which is given powers by statute to do particular things, cannot be held liable at common law for, say, nuisance, by properly doing that which the statute empowers the corporation to do or which the statute contemplates that the corporation should do. I accept, of course, the proposition that if the terms of the Companies Act, 1948, were clear and imperative they would necessarily supersede the common law rule. For example, if section 302 had said, ' liabilities whether enforceable in the courts of this country or not,' there would be no room for an invocation of Lord Mansfield's rule; but, in my judgment, the terms of the section are not so clear and are not so imperative. Indeed, I find no difficulty in treating the use of the word 'liabilities' consistently with giving it its widest scope, as meaning liabilities in the sense of claims capable of enforcement in these courts, and so as not to include every liability of every kind, such as a statute-barred debt or an obligation of a kind which no court of the country could ever enforce.

"Mr. Mustoe finally argued that, accepting the rule as I have stated it, still it should not apply to States within the so-called 'consortio' of the British Commonwealth. I can find no possible basis upon which a distinction can be drawn between States adhering to the British Commonwealth and other States. I have already said that this case may, in all the circumstances, appear to be a hard case, and I can see that in modern conditions there may be good arguments for some relaxation of the rule as between States of the Commonwealth. But that is plainly a matter to be regulated by executive action, by convention or agreement between governments, who could decide to what extent and subject to what conditions, if any, the revenue claims of one member State ought to be treated as enforceable in other member States.

"I have assumed that we are here dealing with a sum certain which in India should be treated as having been due or as being due from the company to the Indian Government. It has been convenient so to treat it, though it is perhaps right for me to say that I understand that in fact the actual amount of the assessment is not yet finally determined. The liquidator obtained leave to challenge the amount of the assessment without prejudice to his contention (which was communicated in India to the authorities concerned) that in any circumstances no part of it could be admitted to proof. I mention the fact because Mr. Mustoe contended that certain observations to be found in letters, and in the declaration of solvency, and in the language of certain orders made, and the conduct generally of the liquidator, amounted in some way to an admission on the liquidator's part from which he could not now resile, and that that made this case an exception to the general rule which I have stated, even if the rule were otherwise applicable. In my judgment there is no ground for saying that any of the facts which I have mentioned amount to such an admission, or prevent the liquidator quite properly from taking the point which he has taken and contending that this debt cannot be admitted to proof.

"The result is that I agree with the conclusion of Vaisey J. I agree with him also that the paucity of direct authority may well be due to the fact that for so long a period this rule has been regarded as too well established to make effective challenge possible. However that may be, I concur with the judge and with the reasons which he gave, and accordingly, in my view, this appeal fails and must be dismissed."

Jenkins and Morris L.JJ. gave short judgments to the same effect.

[Report: [1954] Ch. 131.]

Recognition of Acts of Foreign States—Acts of Nazi Officials in Germany—Allegation of Duress.

Bernstein *v.* N. V. Nederlandsche-Amerikaansche Stoomvaart-Maatschappij.

United States, District Court, Southern District, New York. December 9, 1953.

Court of Appeals, Second Circuit. February 5, 1954.

The Facts.—See, for earlier proceedings in this case, *Annual Digest*, 1948, Case No. 10. The plaintiff now filed a third amended complaint (1) alleging the issue of a licence to the plaintiff as receiver for the Red Star Line pursuant to regulations issued under the Trading With the Enemy Act, and (2) specifying the private persons by whom, and the manner in which, the alleged duress was exercised, as required by the Court of Appeals. The plaintiff attached to his complaint a copy of a press release from the Department of State, issued more than a month after the decision of the Court of Appeals, in which was quoted a letter from the Acting Legal Adviser of the Department to the plaintiff. The letter stated:

> " The policy of the Executive, with respect to claims asserted in the United States for the restitution of identifiable property (or compensation in lieu thereof) lost through force, coercion, or duress as a result of Nazi persecution in Germany, is to relieve American courts from any restraint upon the exercise of their jurisdiction to pass upon the validity of the acts of Nazi officials."

The defendants moved to dismiss on the ground that the amended complaint did not comply with the requirements established by the Court of Appeals.

Held (by the District Court): that the motion must be denied. The complaint was " sufficient insofar as the allegations with respect to the appointment and powers of the receiver are concerned " and validly set forth a claim in private duress. The press release of the Department of State did not, however, have the effect of amending the mandate of the Court of Appeals and could not be considered unless the plaintiff were to obtain an amendment of that mandate.

The Court said: " In view of my conclusion that the allegations of the complaint set forth a claim in private duress, it is not now absolutely necessary for me to pass upon the effect of a State Department press release issued since the decision of the Court of Appeals and pleaded as part of the third amended complaint in what is evidently an attempt to reopen the door for proof of governmental duress. Since, however, most of the argument on this motion was directed to this point, and since it is unlikely that plaintiff will content himself with offering proof of private duress alone at the trial, I think it will be helpful to counsel if I set forth my view here. The Court of Appeals concluded that the legality of the acts of Nazi officials in Germany was not justiciable in American courts. This conclusion was based on its holding in a prior suit by this plaintiff, *Bernstein* v. *Van Heygen Frères Société Anonyme*, 2 Cir., 163 F.2d 246 . . .[1] In the *Van Heygen case*, the Court of Appeals indicated that, since this 'act of state' doctrine[2] is essentially a matter of international relations on which our Executive is the final authority, if our Executive indicated an affirmative intention to lift this commonly accepted judicial restraint, our courts would follow executive policy. Plaintiff has attached to his complaint a copy of a press release from the State Department which was issued more than a month after the decision of the Court of Appeals. [The Court here referred to the press release and letter referred to above, and continued:]

" Defendants contend that the mandate of the Court of Appeals sets forth 'the law of the case' and, therefore, precludes me from considering any changes in law or fact which have occurred since its issuance, including this state Department release.

" It is a well established doctrine that the mandate of an appellate court is binding on the lower court and that the lower court is powerless to redetermine any matters passed upon by the appellate court . . . Upon the trial, therefore, I shall refuse to consider the State Department's press release unless plaintiff has, in the meantime, obtained from the Court of Appeals an amendment of its mandate, or instructions as to the interpretation of its mandate, which would make such consideration proper . . . . ." [Report: 117 F. Supp. 898.]

The plaintiff thereafter petitioned the Court of Appeals to amend its mandate to permit the District Court to pass on the validity of acts of officials of the German government.

Held (by the Court of Appeals): that the mandate must, in view of the expression of Executive policy, be amended to strike out " all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question."

[[1] See *Annual Digest*, 1947, Case No. 5.]

[2] *Underhill* v. *Hernandez*, 168 U.S. 250, 18 S.Ct. 83, 42 L.Ed. 456; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 29 S.Ct. 511, 53 L.Ed. 826; *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726.

The Court said: " In the prior appeal in this case, 173 F.2d 71, 75–76, because of the lack of a definitive expression of Executive Policy, we felt constrained to follow the decision of this court in *Bernstein* v. *Van Heyghen Frères Société Anonyme*, 2 Cir., 163 F.2d 246, *certiorari* denied 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357 [*supra*], by ordering the plaintiff to refrain from alleging matters which would cause the court to pass on the validity of acts of officials of the German government. Following our decision, however, the State Department issued Press Release No. 296 on April 27, 1949, entitled: ' Jurisdiction of United States Courts Re Suits for Identifiable Property Involved in Nazi Forced Transfers.' [The Court here quoted from the press release and letter, the significant portion of which is set out above.]

" In view of this supervening expression of Executive Policy, we amend our mandate in this case by striking out all restraints based on the inability of the court to pass on acts of officials in Germany during the period in question. See 173 F.2d at pages 75–76. This will permit the district court to accept the Release in evidence and conduct the trial of this case without regard to the restraint we previously placed upon it."

[Report: 210 F. 2d 375.]

Recognition of Acts of Foreign States and Governments—Exterritorial Effect of Decrees—Decree of Belgian Government-in-Exile concerning Offences Committed during Occupation of Belgium—Defendant Resident in Holland—Irrelevance of Political Nature of Decree if Not Contrary to *ordre public* of State of the forum.

KINGDOM OF BELGIUM *v.* E.M.J.C.H.

Holland, District Court of The Hague. April 17, 1952.

Court of Appeal of The Hague. August 2, 1953.

THE FACTS.—The defendant had collaborated with the Germans in Belgium during the First World War and after 1918 had been prosecuted for that collaboration by the Belgian *Ministère Public*. When during the Second World War German forces again occupied Belgium, the German military commander for Belgium and Northern France issued a decree, on September 6, 1940, awarding compensation out of the Belgian Treasury to persons who, like the defendant, had been prosecuted for collaboration. The defendant duly received such compensation. By Decree-Law of June 2, 1944, the Belgian Government in London ordered that any person who received this compensation under the German Decree must refund it to the Belgian State. After the war, the Belgian State commenced proceedings against the defendant, who lived in Holland, for recovery of the compensation paid to him.

The defendant challenged the jurisdiction of the Court, contending that the exercise of such jurisdiction would be contrary to international law, because this case concerned a dispute between a foreign State and one of its subjects, and not only bore a political character but also involved the binding force of foreign political legislation.

Held (by the District Court): that it had jurisdiction and that the claim was admissible and well-founded in law.

The Court said: " The law of nations . . . does not deny jurisdiction to national courts in cases where a foreign State itself submits a dispute to those courts for adjudication. Although the political character of foreign legislation may in some cases be such that the public policy of the forum requires its non-application, this is not true in regard to the Belgian Decree-Law in question, the aim of which was to obviate the consequences of certain acts of the occupying Power. Such a measure is not contrary to Netherlands *ordre public*, as a similar measure has also been put into effect in the Netherlands. By signing the Inter-Allied Declaration against Acts of Dispossession committed in Territories under Enemy Occupation or Control, the Netherlands Government recognized that a similar restoration of the legal state of affairs was also necessary in other countries."

The defendant appealed.

Held (by the Court of Appeal): that the appeal must be dismissed and the lower judgment upheld, but on slightly different grounds. It was contended on appeal (a) that although the Belgian State voluntarily submitted to its jurisdiction, the Court still lacked such jurisdiction, since the action bore not only a public law but also, to a certain extent, a political character; and (b) that entertaining the action would amount to a violation of Netherlands sovereignty.

The Court said: " This action is in no way incompatible with the territorial sovereignty of the State of the Netherlands. The claim brought by the Belgian State was concerned only with the repayment by the present appellant of certain moneys under an obligation based on a statute enacted by the Belgian legislature. The entertaining of such an action by a Netherlands court does not constitute submission either to the act of a foreign State or to the exercise of a public right by the Belgian State on Netherlands territory. Jurisdiction is not dependent upon whether the action might bear a public law or even a political character, but merely upon whether its exercise would be contrary to Netherlands '*ordre public*' or to established Netherlands legal concepts. [In support, the Court cited Niboyet's *Traité de Droit international privé français*, vol. III, No. 946, pp. 331–338.] When courts have refused to enforce foreign legislation of a public law or political nature, it has usually not been on the ground of the nature of the legislation, but on the ground either that, by reason of its general trend and contents, this legislation was meant to take effect only within the territory of the foreign State—which was not the case with the Belgian statute under consideration—or that enforcement of such legislation would conflict with the national '*ordre public*' of the forum or with its established national legal concepts. Neither ground applied in this case. By entertaining the action of the Belgain State, the Court below in fact applied the accepted principle of international law, necessitated by the requirements of international intercourse, under which States ought to assist each other in securing extra-territorial effect to their legislation which concerns their subjects, unless such legislation conflicts with '*ordre public*' or established national legal concepts."

[Reports: *N.J.*, 1953, Nos. 435 and 589.]

NOTE.—See also *Kingdom of Belgium* v. *Wannijn, infra.*

Recognition of Acts of Foreign States—Belgian Decree-Law of 1944 concerning Money Awards by Occupant—Effect of Inter-Allied Declaration of 1943 relating to Unlawful Dispossession by German Occupation Authorities—Enforceability of Decree-Law before Dutch Courts.

KINGDOM OF BELGIUM *v.* ALBRECHT AND WILLEM WANNIJN.

Holland, District Court of 's-Hertogenbosch. January 16, 1953.

Court of Appeal of 's-Hertogenbosch. June 29, 1954.

THE FACTS.—(See also *Kingdom of Belgium* v. *E.M.J.C.H., supra,* p. 26.) During the German occupation of Belgium the so-called "Borms Commission" had, on the basis of a German Decree of September 6, 1940, awarded to each of the defendants the sum of one million Belgian francs. This Commission had been established by the German occupation authorities in Belgium to carry out the provisions of the German Decree, mentioned above, the purpose of which was to indemnify Belgian nationals who during the First World War had been "loyal" to Germany and who therefore had been punished after the end of that war by the Belgian Government. To each of the defendants the Belgian Treasury had on July 15, 1943, paid the sum mentioned. The Belgian State now claimed repayment, invoking: (a) the nullity of the German Decree, as being contrary to international law and in particular to Article 43 of the Hague Regulations; and (b) two Decree-Laws of the Belgian Government in London, one of which laid down that anyone who had received money by virtue of that German Decree, was to repay to the Belgian State the amount received plus the legal interest.

Held (by the District Court): that the action must be dismissed.

The Court said: " The mere fact that a decree of an Occupying Power is contrary to international law, and in particular to Article 43 of the Hague Regulations, does not mean that such a decree cannot have legal effect. There is no proof that the Contracting Parties intended that all administrative acts of an Occupying Power which might violate the Hague Rules should *eo ipso* be void. The interests of the population of the occupied territory would in no way be furthered by the resulting uncertainty about the legal situation. The opinion of the Belgian Legislature in this matter does not coincide with that presented in this action by the Belgian State. The former deemed it necessary to provide expressly, in the Decree-Law of June 2, 1944, that individuals who received money by virtue of the German Decree should repay such money. This would have been superfluous if the Belgian State could institute a *condictio indebiti* against those who had benefited from that Decree, on the mere ground of its invalidity. The Belgian Decree-Law of January 10, 1941, concerning the nullification of occupation regulations is based on the same point of view, since the Belgian Government, according to the official report relative to this Decree-Law, paid special attention to occupation regulations conflicting with Article 43 of the Hague Rules and nevertheless provided, with regard to these very regulations, that they were cancelled ' au fur et à mesure de la libération du territoire '. A Decree-Law of the same date declaring null and void any act of the Occupying Power disposing of property of the Belgian State other than in accordance with normal administration, relates, according to its scope and effect, to recoverable goods only, and not to money. The present action can, therefore, rely only on the Decree-Law of June 2, 1944. By that Decree-Law the Belgian State acquired the right to reclaim sums which, by virtue of a German act of State, had been paid to certain categories of Belgian citizens to the detriment of the Belgian State. This Decree-Law therefore is of a public law nature, and the action relying on it is of the same nature. By a generally recognized rule of international law, a State cannot perform any act of sovereignty or exercise any public right on the territory of another State without the consent of that other State, since this would be incompatible with the territorial supremacy of the latter. This principle of international law does not impair the competence of the Netherlands courts, but it means that the plaintiff's action against the defendants cannot be received.

The plaintiff also contended that the Decree-Law could be enforced in the Netherlands, seeing that the Inter-Allied Declaration of January 5, 1943, to which both the Netherlands and the Belgian Governments were parties, declared it to be a common aim to undo acts of dispossession committed in territories under enemy occupation or control. It does not, however, follow from this Declaration that measures which every individual Government might deem it necessary to enact to that effect after the liberation, should be enforceable in the territory of another Signatory Power. Even if it were to be accepted that the German Decree lacked *ab initio* binding force, and that the Belgian State therefore could recover the amounts paid under it to the detriment of the Belgian Treasury, this action could not succeed. The German Occupation Authorities, by indemnifying individuals who by their " loyal " attitude towards the Occupying Power during the 1914–1918 War had suffered damage, and the " Borms Commission " which had been established by the Occupying Power to enforce its Decree, were exercising in fact public power, as a consequence whereof public law relations were created between the Belgian State and the individuals indicated by the " Borms Commission ". An action for repayment of sums paid without any basis in public law must likewise be considered as having a public law character . . . .

The Belgian State appealed.

Held (by the Court of Appeal): that the decision of the Court below must be reversed and that the action for repayment must succeed.

The Court said: " Article 1 of the Belgian Decree-Law of June 2, 1944, provides:

> " All who, by virtue of the German Decree of September 6, 1940, ... received directly or indirectly any money or investments, shall repay to the State the capital as well as any interest thereon."

There can be no doubt that the defendants, according to Belgian law, are bound to repay to the appellant the sums received. The legal relation between the parties is governed by Belgian law on the ground: (*a*) that it originated in the defendants having received sums of money at the expense of the Belgian State by virtue of a decree of the Occupant in the exercise of supreme power over Belgian territory, and (*b*) that the defendants possessed Belgian nationality. The only question to be answered is whether the appellant can sue before a Netherlands court to enforce a right accruing to it under Belgian law. The question whether this Belgian Decree-Law is of a private or a public law nature need not be decided, because even if this Decree-Law is of a public law nature, the appellant's action is receivable. The Decree-Law, the intention of which is to guarantee repayment to the Belgian Treasury of monies which, as a consequence of acts of the German Occupant, were paid to its detriment, is not a fiscal law. What is under consideration here is a measure relating to a war in which the Netherlands and Belgium were involved as allies against Germany. It is incompatible with this allegiance against a common enemy that it should be impossible to recover within the Netherlands sums that were paid to individuals of Belgian nationality pursuant to an act of the German Occupying Power. It should, therefore, be accepted that an action to recover such sums lies in the Netherlands courts. This is confirmed by the Inter-Allied Declaration of London of January 5, 1943, and by the Agreement of Paris of January 14, 1946, to which both the Netherlands and Belgium are parties. Both instruments are based on the common cause of the Allied Powers and on their obligation of mutual aid and assistance by way of measures taken against the activities of the common enemy. Moreover, it is of interest to observe that Netherlands wartime legislation—such as the Royal Decrees A 1 and A 6, which are undoubtedly of a public law nature—has been applied by foreign courts. The argument of the defendants that the Belgian Legislator never intended to create a right of action against individuals who were not resident in Belgium does not find support in the Decree-Law itself, which is phrased in general terms. Neither is the Decree-Law in conflict with Netherlands public policy. The question here is only whether the annulment of an act of the Occupying Power is in conflict with Netherlands public policy. This question must, undoubtedly, be answered in the negative since it is not an offence against Netherlands public policy to annul acts of the Occupying Power for the reason only that they were imposed by a foreign Occupant.

[Reports: *N.J.*, 1954, No. 301; *Tijdschrift*, Vol. I, p. 427.]

NOTE.—The Court of Appeal of 's-Hertogenbosch arrived at the same conclusion as the Court of Appeal of The Hague in *Kingdom of Belgium* v. *H.* (see *supra*, p. 26). Its statement of reasons differs widely, however, from that of the Court of Appeal of The Hague. The latter judgment is commented upon by Dr. K. Jansma in *Mededelingen van de Nederlandse Vereniging voor Internationaal Recht*, 1954.

Recognition of Acts of Foreign States—Limits of—Confiscation of Property by Foreign Legislation—Extra-Territorial Effect of—Confiscation of German Property in Czechoslovakia—Purpose of Confiscation—Law No. 63 of Allied High Commission for Germany—Whether German Courts Competent to Determine Rights of Ownership in Property after Transfer thereof to Germany.

CONFISCATION OF GERMAN PROPERTY IN CZECHOSLOVAKIA CASE.

German Federal Republic, Federal Supreme Court. January 29, 1953.

THE FACTS.—The parties to this case were " Sudeten Germans " who were domiciled in Czechoslovakia during the Second World War. In 1945, while the plaintiff was a prisoner of war, the defendant moved into a flat in Czechoslovakia of which the plaintiff was still legally the tenant and in which he, the plaintiff, had left his furniture. In 1946 the defendant left Czechoslovakia to take up residence in the Federal Republic of Germany, and on leaving the plaintiff's flat he took with him certain articles of furniture which were the property of the plaintiff but which he alleged had been given to him, the defendant, by the Czechoslovak authorities in recognition of his services as a " recognized anti-Fascist ". In the present action the plaintiff claimed the return of the articles of furniture, his contention being that it would be against the German *ordre public* to recognize the confiscation, in favour of the defendant, of his, the plaintiff's, property by the Czechoslovak authorities. On behalf of the defendant it was contended that the German courts were not entitled to exercise jurisdiction in the matter as by virtue of Law No. 63 of the Allied High Commission for Germany they were precluded from determining matters relating to the ownership of German property situate in an Allied country and expropriated by the legislation of that country in connection with the war against Germany or in order to satisfy claims against Germany. The Court of first instance and the Court of Appeal upheld the plaintiff's contention, on the ground that the confiscation of the plaintiff's property in Czechoslovakia in favour of the defendant violated the German *ordre public* and was therefore not enforceable as against the plaintiff. The defendant appealed to the Supreme Court.

Held: that if it could be shown that the transfer of the plaintiff's property to the defendant had, in fact, taken place in connection with the war against Germany or in order to satisfy claims against Germany, the German courts would be precluded from exercising jurisdiction by virtue of Law No. 63 of the Allied High Commission for Germany. If, on the other hand, it could not be shown that the plaintiff's property had been transferred to the defendant for one or other of these purposes, then the plaintiff would be entitled to the return of his property. As the Courts below had not ascertained the full facts, the case must be sent back in order that the purpose of the confiscation of the plaintiff's property in Czechoslovakia might be ascertained; only then could the rival claims of the parties be finally determined.

The Court said: " The present proceedings would not be permissible . . . if they concerned assets which before the entry into force of Law No. 63 were situate in a foreign State and owned by Germans, and which after September 1, 1939, were transferred or liquidated in accordance with the *lex rei sitae* ' in the prosecution of measures taken by the Government of a State which acceded to the Declaration by the United Nations of January 1, 1942, in connection with the war against Germany ', or in the prosecution of measures taken ' for the purpose of satisfying claims against Germany '. Czechoslovakia is a ' foreign State ' within the meaning of Law No. 63, and the property here in issue was ' owned by Germans ' in Czechoslovakia . . . Sudeten Germans are also German nationals. They acquired German nationality by virtue of the Treaty of October 20, 1938, between the German Reich and the Republic of

Czechoslovakia, and the Law of November 21, 1938, on 'the Re-Unification of the Sudeten German Territories with the German Reich'. They retained that nationality after the capitulation. . . .

"The purpose which Law No. 63 is designed to serve quite distinctly favours an interpretation that the property of Sudeten Germans shall be considered 'German property'. While Control Council Law No. 5 provides for the expropriation of persons owning property situate abroad, even where such property is situate outside territory subject to the jurisdiction of the Control Council, Law No. 63 does not provide for any expropriation but confines itself to sanctioning the validity, within the territory of the Federal Republic, of liquidations of German property which have taken place or are still to take place in foreign countries. . . . As a general rule, therefore, all liquidations must be recognized which have been carried out by foreign States in accordance with the conditions laid down in Article 1*a* (i–iv). It follows that the question as to what constitutes German property must be determined in accordance with the legislation of the individual enemy countries carrying out such liquidations. The attitude adopted by the Czechoslovak State towards Sudeten Germans since 1945 leaves no doubt that it treated Sudeten Germans as Germans, and their property as German property. This follows from the Decree of August 2, 1945, which deprived of their Czechoslovak nationality those Czechoslovak citizens of German origin who had acquired German nationality 'in accordance with the laws of a foreign Occupying Power', such loss of Czechoslovak nationality to date from the date of acquisition of German nationality; it also follows from the Decree of October 25, 1945, which is here of paramount importance and which assimilates the property 'of natural persons of German ethnic affinity' to property of the German Reich.

"However, we must investigate further the question whether the other conditions laid down in Article 1*a* of Law No. 63 are satisfied. The Decree of October 25, 1945, concerning the confiscation of enemy property and the fund for national reconstruction, is a measure taken in connection with the war against Germany as well as a measure taken to satisfy claims against Germany, in so far as it provides for the confiscation of German property without payment of compensation. To date, however, there are no clear findings of fact whether the defendant also acquired the disputed property in the prosecution of such measures, *i.e.*, in pursuance of the said Decree. The Appeal Court merely assumed—without ascertaining—a transfer of property and possession to the defendant. On the basis of that assumption it was entitled, from its own point of view, to confine itself to holding that Article 30 of the Introductory Law to the German Civil Code[1] precluded the application of

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[1] This is the provision which precludes the application of a foreign law violating the German *ordre public*.

Czechoslovak confiscatory legislation. However, having regard to Law No. 63, it now becomes relevant to arrive at a precise clarification of the factual events resulting in the expropriation and transfer of the property."

[Report: JZ, 8 (1953), p. 274.]

Recognition of Acts of Foreign States and Governments—Nationalization of Czechoslovak Banks—Retention of Corporate Existence—Capacity to Sue in Switzerland—Compulsory Transfer of Assets—Effect on Assets Situate Abroad.

ZIVNOSTENSKA BANKA *v.* WISMEYER.

Switzerland, Federal Tribunal, Civil Division. January 23, 1953.

THE FACTS.—In 1925 the Böhmische Union Bank of Prague took 600 shares in a Swiss Company, Libella A.G. The share certificates remained deposited in Switzerland. On August 23, 1945, the Czechoslovak Finance Minister by decree ordered the liquidation of the Böhmische Union Bank; the decree provided that the assets of the Bank were to be offered to the Legiobanka A.R. of Prague. By virtue of a protocol of April 15, 1946, the Libella shares were thus, *inter alia*, transferred to the Legiobanka. On January 1, 1948, the assets of the Legiobanka were in turn taken over by the Zivnostenska Banka. In that year the respondent attached the share certificates for the purpose of satisfying a claim against the Böhmische Union Bank. In the ensuing proceedings the share certificates were declared to be the property of the Zivnostenska Banka. The respondent appealed. He contended, first, that the Zivnostenska Banka lacked capacity to sue in Switzerland, since it had been nationalized in 1945, and that nationalization without compensation was contrary to Swiss public policy and could not be recognized. He contended, secondly, that the assets of the Böhmische Union Bank had been transferred to the Legiobanka by an act of public law, which could have no effect outside Czechoslovak territory. The Superior Court of Zürich, in a judgment dated August 29, 1952, accepted the second contention. The Zivnostenska Banka now appealed against that judgment.

Held: that the appeal must be allowed. In Czech law the Zivnostenska Banka had not yet lost its independent existence and its capacity to sue; the fact of that retention of its capacity to sue could not be considered to be contrary to public policy. The transfer of the assets of the Böhmische Union Bank was a private law transaction, which could affect property in Switzerland unless it was contrary to public policy. This last aspect required to be examined by the Court below.

The Court said, in part: "The respondent does not sufficiently distinguish between the legal existence of the appellant Bank, on the one hand, and consideration for Swiss public policy, on the other.

"(a) The question of the legal capacity of a foreign body corporate must be determined according to the law of its seat, *i.e.*, in this case according to Czechoslovak law . . . . The Superior Court found that by a Czechoslovak Law of March 9, 1950, a State Bank was created which was to take over all the rights and obligations of the Zivnostenska Banka, but that the latter did not thereby lose its legal personality seeing that Article 2, para. 2, of the Law provided that the banks to be successively taken over by the State Bank according to directives of the Ministry of Finance would cease their activities by the transfer of their rights and obligations to the State Bank, but would cease to exist only on a day to be announced by the Ministry of Finance in the Official Gazette. It was not contended that any such announcement had been made with respect to the appellant Bank . . . The comparison made by the respondent with the analogous cases of Russian nationalized undertakings cannot be sustained, for in the judgments concerned it was found that the Russian Banks had, according to Russian law, ceased to exist . . .

"(b) The respondent further maintains that the recognition of the legal capacity of the appellant company is contrary to Swiss public policy . . . This contention is unfounded. The respondent argues in support of this contention that the former shareholders in Zivnostenska Banka were not compensated for its nationalization. However, he proceeds on the assumption that persons holding rights and interests in the former Czech banks have been replaced by national undertakings. As stated above, this is not the case in Czech law. And if the Zivnostenska Banka still has legal existence, the question of the compensation of its shareholders is no doubt premature. Even in Swiss law the distribution of assets presupposes the dissolution of the company and the payment of all debts.

"Even apart from this, it is difficult to see how Swiss public policy can be affected by the legal capacity of the appellant Bank. Even if the shareholders of the Zivnostenska Banka had not been compensated for the absorption of their company by the State Bank, and Swiss legal sentiment had thereby been outraged, it is difficult to see why the capacity of the appellant Bank to sue should be affected thereby. The appellant claims the right to sue not because of, but in spite of, the absorption; without that absorption the legal capacity of the formerly independent Zivnostenska Banka would never have been questioned. The objectionable nature of the dispossession of the shareholders does not lie in the fact that its suppression did not extend to its legal capacity. A different question is what consequences arise, in the eyes of Swiss public policy with respect to assets of the former Company, from an expropriation of the formerly independent Bank or its shareholders . . . .

"The lower Court allowed the appeal exclusively on the ground that the decree of the Minister of Finance of August 23, 1945, was an act of public law, the limits of which were the frontiers of the decreeing State, and which thus could not affect assets situate in Switzerland, and that the same was true of the legal act of transfer of the shares from the Böhmische Union Bank to the Legiobanka . . . It need not be decided here whether the rule, enunciated in BGZ, 74, II, 229, to the effect that the public law of a foreign State cannot, as a matter of principle, be applied or enforced in Switzerland, is not formulated in terms which are too absolute and general (*cf.* the critical note by Gutzwiller in *Annuaire Suisse de Droit international*, vol. VI (1949), p. 221) . . .

"The lower Court was correct in deciding that the decree of the Minister of Finance of August 23, 1945, was an act of public law, issued by an organ of the State within the sphere of its authority. But it was directed only at two Czech companies, the Böhmische Union Bank and Legiobanka, and did not require enforcement in relation to Swiss nationals. The transfer of the shares by the Böhmische Union Bank to the Legiobanka for 3 million Kronen is a different matter. That transfer admittedly took place on the basis and within the framework of the decree of the Minister of Finance ordering the former Bank to go into liquidation and to offer its assets to the latter, which offer clearly led to the agreement on transfer. We thus have an agreement arrived at under compulsion to contract. The compulsion rests on public law ; this does not, however, mean that the agreement itself was an act of public law. On the contrary, the contractual relations must be regarded as a matter of private law . . .

"There remains the question whether Swiss public policy is opposed to the recognition of the acts of private law. The lower Court expressly left this question open. It must now examine it . . ."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 79 (1953), Part II, pp. 87–98.]

Recognition of Acts of Foreign States and Governments—Confiscatory Legislation—Confiscation of Obligations of Company having its Seat Abroad—Public Policy of State of Seat of Company.

SCHWEIZERISCHE LEVENSVERSICHERUNGS- UND RENTENANSTALT *v.* ELKAN.

Switzerland, Federal Tribunal, Civil Division. March 26, 1953.

THE FACTS.—In 1931 the respondent, then resident in Münich, took out a life insurance policy, payable in Swiss francs, with the appellant Company. In 1943, when the respondent was in a concentration camp, the finance authorities of Münich informed the local branch of the appellant Company that the property of the respondent had been confiscated by the German Reich, and compelled payment to the Reich of the sums due under the life insurance policy. In 1949 the respondent, who had come to Switzerland, sued for a declaration that the appellant Company had not carried out its obligations under the policy, and that his rights under that policy subsisted. In support of that claim he contended, first, that the obligations of a company whose seat was in Switzerland were situate in Switzerland, and therefore could not be reached by German confiscatory legislation. He contended, secondly, that in any case the recognition of that confiscatory legislation was contrary to Swiss public policy. The Superior Court of Zürich, in a Judgment of May 27, 1952, accepted these contentions. The present action was an appeal against that decision.

Held: that the decision of the Superior Court of Zürich must be quashed, and the case returned to the Court below for retrial. The obligations of a Swiss company which were comprised within the business activities of a foreign branch could not be said to be exclusively subject to Swiss territorial competence with regard to confiscation. The question of public policy did not arise where the Swiss courts were not asked to assist in the confiscation, but merely to note that it had taken place in the past.

The Court said, in part: " The contract of insurance in question is subject to German law . . .

" The Superior Court takes the view that the contract has remained in force by reference, first, to the consideration that the obligations are ' situate ' in Switzerland and do not fall within the scope of German confiscatory legislation. In this connection the Court refers to its decision of October 13, 1950, in the case of *Gottstein* v. [*The Same Company*]. There it is held that obligations not embodied in securities are situate at the domicil of the debtor . . .

" The judgment in the case of *Gottstein* referred, to begin with, to the separation of the spheres of competence of the different States. That is indeed the starting point. It is the prevalent view, accepted also in Switzerland, that acts of State directed towards the seizure or expropriation (subject to compensation or by way of confiscation) of goods or other assets, are operative only in that State's own territory. However, in the case of obligations which are not embodied in securities, the ' situs ' of the obligation cannot be simply determined as a fact . . . Obligations of a Swiss company coming within the business activities of a foreign branch cannot be said to be exclusively subject to Swiss territorial competence . . . It would thus be perfectly admissible for German law to consider such obligations subject to its competence . . .

" The question remains whether the extinction of the obligations should, with reference to Swiss public policy, be deemed not to have taken place. Admittedly, the confiscation, based as it was on national-socialist racial legislation, could not have been enforced in Switzerland against the respondent. However, since the German Reich has seized the claim of the respondent under the policy and made it legally effective in relation to the German branch of the appellant Company, without there being a possibility of undoing what has been done, Swiss public policy does not require the non-recognition of the event and the imposition on the appellant company of an obligation which is not incumbent on it if it properly fulfilled the contract in the material legal situation governed by German law. That would constitute an expropriation of the appellant Company, not to be justified by reference to the fact that the expropriation of the respondent at the hands of the national-socialist State was unworthy of a State respecting the law [*Rechtstaat*] in the eyes of Swiss, as of present German, law."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 79 (1953), II, pp. 193–208.]

Recognition of Acts of Foreign States and Governments—Dissolution of Partnership Registered in Foreign State—Confiscation without Compensation—Whether Confiscation Affects Assets of Partnership Situate in Country of Forum.

In re METALLWERKE Z. & G.

Austria, Supreme Court. June 3, 1953.

THE FACTS.—One Z. was a partner in a partnership carrying on business and registered in Yugoslavia. By will he bequeathed all his property to the defendant herein, and by a subsequent codicil he bequeathed one-fifth of his share in the partnership to the plaintiff herein. Early in 1945 the partnership business was confiscated by a decree of the Yugoslav Government, and on October 22, 1945, Z. died. Shortly before the confiscation of the partnership business one of the managers of the latter succeeded in transferring to Austria certain monies belonging to the partnership. These monies were subsequently distributed to the various partners in the proportions of their shares in the assets of the partnership, and the defendant received the share to which Z. would have been entitled if he had then been alive. The plaintiff now brought an action against the defendant for one-fifth of the monies received by him. In support of her claim she relied on the codicil to Z.'s will and on the contention that the confiscation of the assets of the partnership in Yugoslavia had no extra-territorial effect and did not therefore affect the status of the assets of the former partnership in Austria.

Held: that the Yugoslav decree of confiscation did not affect the status of the assets of the partnership which were in Austria, and that the plaintiff was accordingly entitled to judgment.

The Court said: "According to the established jurisprudence of the Supreme Court, a confiscation without payment of compensation affects only such of the assets of a partnership which has been confiscated by a foreign State as are situate in that State, and not those which are situate in Austria. By virtue of the confiscation the former partnership 'Metallwerke Z. & G.' was dissolved; it has ceased to exist. In view of the fact that the transfer of the assets of the partnership situate in Austria to a Yugoslav enterprise which may possibly still exist is not recognized in Austria, those assets devolve *ipso jure* upon the former partners. The latter must be regarded as co-owners of the assets situate in Austria, and they are entitled to deal with these assets in accordance with their shareholdings in the main partnership property."

[Report: SZ, XXVI (1953), p. 397.]

Recognition of Acts of Foreign States and Governments—Acts Contrary to International Law—Expropriation and Confiscation.

See p. 305 (*Anglo-Iranian Oil Company* v. *Idemitsu Kosan Kabushiki Kaisha*).

Recognition of Acts of Foreign States and Governments—Acts Contrary to International Law—Expropriation and Confiscation.

See p. 316 (*Anglo-Iranian Oil Co.* v. *Jaffrate and Others* (*The Rose Mary*)).

Recognition of Acts of Foreign Governments—Nationalization Decree—Enforceability in Territorial Waters of Foreign State.

See p. 193 (*Latvian State Cargo and Passenger Steamship Line et Al.* v. *The United States*).

Recognition of Acts of Foreign States—Confiscatory Legislation.

See p. 82 (*Naamloze Vennootschap Suikerfabriek "Wono-Aseh"* v. *Chase National Bank of City of New York et Al.*).

Recognition of Acts of Foreign States and Governments—Legislative Acts of a Political Character.

See p. 655 (*De Rothschild* v. *Teuscher and Société d'Encouragement pour l'Amélioration des Races de Chevaux en France*).

B—COMPOSITE AND DEPENDENT STATES AND TERRITORIES

II.—British Commonwealth of Nations

British Commonwealth of Nations—Treaties—Operation of—British Treaties—Application to Independent Members of the Commonwealth—Canada—Treaties Concluded Prior to the Statute of Westminster, 1931.

Ex parte O'DELL AND GRIFFEN.

Canada, High Court of Ontario. February 9, 1953.
(Schroeder J.)

THE FACTS.—O'Dell and Griffen were committed to prison until surrendered to the United States of America, where they were under indictment on a charge of murder, or until discharged according to law. They applied for a writ of *habeas corpus*, admitting that there was a *prima facie* case against them but claiming (1) that there was no subsisting extradition treaty between Canada and the United States, since the only relevant treaty was the Ashburton Treaty of 1842 entered into between Her Britannic Majesty and the United States, and that that treaty, made by the Imperial Government on behalf of Canada as a Colony, no longer has effect in view of the change in Canada's status from that of a Colony to that of an independent nation, by virtue of the Statute of Westminster, 1931;[1] (2) that the non-observance of certain Canadian procedural rules invalidated the order for the committal of the two fugitives.

Held: that the application must be dismissed. The Statute of Westminster did not *per se* render invalid treaties concluded by the Imperial Government prior to the passing of that Statute and intended to apply to Canada. Further, the technicalities of local criminal procedure should not be allowed to stand in the way of the proper discharge of treaty obligations.

The Court said: " It is undoubtedly true that since 1931 Canada has been independently represented in the United States and in other foreign nations by her own diplomatic representatives and has entered into treaties with foreign countries through her own Ministers of State without reference to the Government of the United Kingdom, but I am quite unable to apprehend how it can be said that the enactment of the Statute of Westminster can possibly have the effect ascribed to it by counsel. The true relationship of the Crown to the various countries composing the British Commonwealth is set forth in the preamble of the statute.

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[1] 22 Geo. 5, c. 4.

"The Statute goes on to provide that the Colonial Laws Validity Act, 1865,[2] shall not apply to any law made after the commencement of the Statute of Westminster by the Parliament of a Dominion. It is declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation. It is further provided that no Act of the Parliament of the United Kingdom thereafter passed shall extend or be deemed to extend to a Dominion unless it is expressly declared in that Act that the Dominion has requested, and consented to, the enactment thereof. These and other sections of the Act convey some idea of the purpose for which the Statute was passed. Had it been intended that the Ashburton Treaty or any . . . statute which had been enacted by the Imperial Government or Parliament prior to this time, affecting Canada or any of its Provinces, should cease to have validity, one would expect to find express provision for it in the Statute of Westminster or in some other statute. There is nothing to prevent Canada from entering into a new treaty with the United States or substituting some other extradition arrangement for the one which is now embraced within the terms of the Ashburton Treaty, but until that is done that Treaty remains in full force and effect and is binding upon the signatories thereto, including Canada."

[Report: (1953), 3 D.L.R. 207.]

British Commonwealth of Nations—Position of British India Prior to Independence—British India as a Contracting Party to the Warsaw Convention of 1929—Devolution on Independent India of Rights and Obligations under International Agreements—Meaning of International Carriage by Air.

DABRAI *v.* AIR-INDIA LIMITED.

India, High Court of Bombay. April 17, 1953.
(Shah J.)

THE FACTS.—On November 17, 1947, the plaintiff delivered to the defendants, at Karachi (Pakistan), a parcel containing gold, for carriage by their air service to Bombay. The parcel was stolen from the Bombay office of the defendants and could not be delivered to the plaintiff. In an action by the plaintiff against the defendants to recover the value of the parcel, the plaintiff alleged that he was entitled to avail himself of the provisions of the Carriage by Air Act, 1934, which gave effect to the Warsaw Convention of 1929 in British India. The relevant question was whether British India had been a High Contracting Party to the Convention of 1929 and whether the rights and obligations under the Convention devolved upon India after independence. It was by reference to these questions that it was necessary to answer the further question whether the Carriage by Air Act, 1934, could be applied to the case as one arising from international carriage and not from inland carriage, as contended by the defendants.

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[2] 28 & 29 Vict., c. 63.

Held: that the carriage of the goods from Karachi to Bombay was " international carriage by air ".

The Court said: " On September 13, 1939, the Governor-General (of India) issued a notification under s. 2, sub-s. (2), of Act XX of 1934 (in supersession of the previous notification) and certified the High Contracting Parties to the Warsaw Convention of 1929 and the territories in respect of which they were respectively parties and the dates on which the Convention came or would come into force in respect of those territories as were specified in cols. 1, 2 and 3 of the schedule annexed to that notification.

" In the schedule, in respect of India the High Contracting Party to the Convention was described as ' His Majesty the King of Great Britain, Ireland and the British Dominions beyond the Seas, Emperor of India,' and the Convention was deemed to have come into operation in respect of India on February 18, 1935. By the Act of 1934 the Legislature of British India (which expression included a substantial part of the territory which is now part of Pakistan) made provision for the application of the rules contained in the Covention to international carriage by air, and in respect of the territories of British India, British India became a High Contracting Party to the Convention. The notification dated September 13, 1939, makes it clear that India became a High Contracting Party to the Convention in respect of the territories of India as from February 18, 1935. To the original Convention India was not a party: . . . The original signatories to the Convention were Germany, Austria, Belgium, Brazil, Denmark, Spain, France, Great Britain and Northern Ireland, the Commonwealth of Australia, the Union of South Africa, Greece, Italy, Japan, Lithuania, Luxembourg, Norway, Holland, Poland, Roumania, Switzerland, Czechoslovakia, the U.S.S.R. and Yugoslavia. Act XX of 1934 was brought into operation as from February 18, 1935. It is not clear from the evidence in this case whether, under r. 38 of the Convention, India acceded to the Convention by a notification addressed to the President of Poland. The Statement of Objects and Reasons for enacting the Act, as published in the *Gazette of India* dated March 17, 1934, Part V at p. 78, appears to indicate that the Government of India proposed to adhere to the Convention as soon as the requisite legislation to implement the provisions of the Covenant had been enacted, and for that purpose they had framed the Bill which was ultimately passed as Act XX of 1934. Whether there was a formal accession to the Warsaw Convention by India is not material for the purpose of the decision in this present case. It may, however, be observed that Shawcross and Beaumont on *Air Law*, 2nd ed., at p. 38, Art. 47, cl. (*e*), state that India had by subsequent accession become a party to the Warsaw and other Conventions.

" In s. 18, sub-s. (3), of the Indian Independence Act, 1947, it was provided:

> ' Save as otherwise expressly provided in this Act, the law of British India and of the several parts thereof existing immediately before the appointed day, shall, so far as applicable and with the necessary adaptations continue as the law of each of the new Dominions and the several parts thereof until other provision is made by laws of the Legislature of the Dominion in question or by any other Legislature or other authority having power in that behalf.'

The Indian Carriage by Air Act, 1934, became, therefore, the law of the Dominion of India as from August 15, 1947. On August 14, 1947, the Governor-General had published an order, No. G.G.O. 17, dated August 14, 1947, called the Indian Independence (International Arrangements) Order, 1947, which provided that the international rights and obligations to which India is entitled and subject immediately before August 15, 1947, will devolve in accordance with the provisions of the agreement arrived at by the Partition Council on August 6, 1947. Under cl. 2 of the schedule to the Order membership of all international organizations together with the rights and obligations attaching to such membership devolved solely on the Dominion of India, and Pakistan was to take steps to apply for such international organizations as it chose to join.

" Under cl. 3 of the schedule to the Order it was provided:

> ' (1) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of India will devolve upon that Dominion.
>
> (2) Rights and obligations under international agreements having an exclusive territorial application to an area comprised in the Dominion of Pakistan will devolve upon that Dominion.'

" The effect of the Indian Independence (International Arrangements) Order, 1947, was, therfore, *qua* the Warsaw Convention, to confer rights and obligations upon the Dominion of India over the territory of India, and similarly upon the Dominion of Pakistan over the territory of Pakistan.

" Admittedly, the consignment in dispute was consigned after August 15, 1947. The question then arises whether an air consignment from a place of departure in Pakistan to a place of destination in India is, since the setting up of the two Dominions, carriage by air within the meaning of the Indian Carriage by Air Act, XX of 1934. It is true that India did not sign the Warsaw Convention, and there is no evidence of accession by India. The original Convention was signed amongst others by Great Britain and certain other components of the Commonwealth like Australia and the Union of South Africa. But the Governor-General of India issued a notification under which 'His Majesty the King of Great Britain and the Emperor of India' was described as the High Contracting Party *qua* India as from February 18, 1935. That notification is, by s. 2, sub-s. (2), of the Act, conclusive evidence of the matters certified therein. It appears that in respect of the territory of the British Commonwealth, the High Contracting Party was deemed to be 'His Majesty the King of Great Britain and Northern Ireland and the Emperor of India'. *Ex facie* the notification under sub-s. (2) of s. 2 of the Act meant that there was a single High Contracting Party in respect of the territories in the British Commonwealth, and inasmuch as a party cannot contract with himself, any travel between the territories of one component of the Commonwealth may be regarded as inland travel, except when there is an agreed stopping place within the territory subject to the suzerainty, mandate or authority of another Power. But what may appear at first sight to be the effect of notification is, in my judgment, not the true effect on a closer examination of the nature of the relation between the different components of the Commonwealth before India became a sovereign republic. As observed in Halsbury's *Laws of England*, 2nd edn., Vol. 11, at p. 34, Art. 57:

> 'It is clear that for many purposes the Dominions are endowed with a considerable amount of international personality independent of the United Kingdom. But the common allegiance and the common Crown interfere with the idea of each Dominion being a distinct sovereign State connected merely in a personal Union.'

In my view even before August 15, 1947, British India was a distinct State with an international personality independent of the United Kingdom, it is true with a severely truncated sovereignty but nonetheless with all the attributes of a State in so far as the territories of British India were concerned. It had its own Legislature, Executive, Judiciary, and nominally its own Army, though so far as external sovereignty was concerned it was entirely under British control. British India, however, was not governed as a part of Great Britain or as a part of the Commonwealth. It is of course difficult to define with precision the exact ties which bound British India to the Commonwealth. But a community of Governments governing all the components of the Commonwealth or the Empire was not a recognized incident of that tie. Each component of the Commonwealth was a separate State with a varying degree of sovereignty and subject to varying degrees of control—internal as well as external and factual as well as legal. If Act XX of 1934 recognised British India as a distinct State *qua* the observance of the Warsaw Convention, the description in the notification issued under s. 2 (2) of 'His Majesty the King of Great Britain and Northern Ireland and the Emperor of India' as a High Contracting Party must mean that His Majesty was the High Contracting Party *qua* each of the States, and that all the component States of the Commonwealth did not collectively as a single unit become a Contracting Party under the Act. In effect the notification makes each individual component of the Commonwealth a High Contracting Party *qua* others within and outside the Commonwealth.

". . . The defendant has strongly relied upon the following observations in paragraph 48 at page 39 of Shawcross and Beaumont on *Air Law*, 2nd edn.:

> 'The status of various components of the British Empire and Commonwealth in relation to the numerous Civil Aviation Conventions cannot be determined by any general formula. The position of each must be examined individually.
>
> In some cases, such as the Warsaw Convention, different parts may be regarded in English law as being one with the whole, whilst by local or other laws they may be regarded as separate parties. The position of new States, such as Burma, Israel and Ceylon is even more obscure.
>
> To some authorities the general rule seems to be that a new State formed upon the breakaway of territory previously subject to another does not succeed to treaty obligations previously incurred by that other, even though it has not expressly denounced them, unless they relate especially to such territory or otherwise have a local character . . . .
>
> Moreover, in the case of certain treaties such as the Warsaw Convention, 1929, new States like India, Pakistan, the Philippines or Israel will not necessarily become parties even by express declaration unless followed by the formalities laid down in the Treaty itself for ratification or adherence.'

" It was urged by [the defendant] that the Covenant entered into by His Majesty the King on behalf of India could not devolve upon the Dominion of India unless all the formalities laid down in the Warsaw Convention itself for ratification and adherence were gone through. But that argument, in my view, loses sight of the essential nature of the relation created by the notification issue. So far as this Court is concerned, for the purposes of Act XX of 1934 the notification must be regarded as conclusive evidence, and the Court cannot go behind the Order and investigate the true position whether British India or India had in fact acceded to the Warsaw Convention and thereby become a High Contracting Party to the Convention. Under the Notification, which must be regarded as conclusive evidence, British India *qua* the territories thereof became a High Contracting Party, and by reason of the partition of the country of what was British India into two Dominions—the Dominion of India and the Dominion of Pakistan—under the Indian Independence (International Arrangements) Order, 1947, the rules and obligations in respect of the territories which fell within the two Dominions devolved upon the respective Dominions. If British India may be regarded under Act XX of 1934 as a High Contracting Party to the Warsaw Convention in respect of the territory which was then a part of British India, the attainment of that State, as a recognition of political maturity, to Dominionhood can obviously not affect her status *vis-à-vis* the Covenant with the other covenanting parties. Nor does the separation of a part of the territory by partition or inclusion of territory by integration of what were Indian States, in my view, affect the real nature of that transition, which while affecting the territorial integrity of British India conferred more extensive political sovereignty upon the two parts of what originally was British India.

" By reason of the provisions of cl. 3 of the schedule to the Indian Independence (International Arrangements) Order, 1947, the rights and obligations under international agreements having exclusive territorial application to the area comprised in the Dominion of India devolved upon the Dominion of India on August 15, 1947, and those rights and obligations in my view included the rights and obligations under the Warsaw Convention. By the Adaptation of the Indian Laws Order, the words British India were replaced by the words Provinces of India, and the Dominion of India, in so far as the Provinces of India were concerned, became a High Contracting Party in respect of those territories, and the rules contained in the schedule to Act XX of 1934 continued to apply to carriage by air as if the Dominion of India was the High Contracting Party. Pakistan having been constituted a separate Dominion and having by reason of the provisions of the Indian Independence (International Arrangements) Order, 1947, become in its turn also a High Contracting Party to the Covenants, any carriage where the place of departure was in Pakistan and the place of destination was in the Dominion of India became international carriage within the meaning of r. 1, sub-cl. (3), of the First Schedule to Act XX of 1934.

" I am unable, therefore, to agree with the contention of [the defendant] that the carriage of the parcel . . . to Bombay was inland carriage and not international carriage."

[Report: 1954 Bombay Law Reporter 944.]

NOTE.—An appeal (No. 121 of 1952) was preferred against this decision. It was dismissed (Chagla C.J. and Dixit J.) on April 17, 1953, by consent of the parties.

British Commonwealth of Nations—Effect of Statute of Westminster on Treaties Made with Respect to Colonies—Canada.

See p. 40 (*Ex parte O'Dell and Griffen*).

British Commonwealth of Nations—Nationality—Irish Citizen Resident in England—Whether Liable for British National Service —Effects of British Nationality Act, 1948.

See p. 286 (*Bicknell* v. *Brosnan*).

British Commonwealth of Nations—Whether Rule of Unenforceability of Foreign Revenue Laws Applies between Members of Commonwealth—Attempt to Prove Indian Taxes in Liquidation of English Company.

See p. 7 (*In re Delhi Electric Supply and Traction Co., Ltd.*).

III.—Protected States and Protectorates.

Dependent States.

Dependent Territories—Protected and Associated States—Status of Tunisia while Protectorate of France—Responsibility for Torts—Acts of Rioters.

TROCHEL *v.* STATE OF TUNISIA.

Tunisia, Tribunal Civil of Tunis. January 28, 1953.

THE FACTS.—The plaintiff brought an action against the State of Tunisia claiming damages for personal injuries sustained as a result of a bottle containing inflammable liquid having been hurled at him by an unknown individual, acting—as was alleged by the plaintiff—in furtherance of riotous disorders which at the material time were constantly occurring in Tunisia. On behalf of the State of Tunisia it was contended that as Tunisia was then a Protectorate of the French Republic, and as the maintenance of law and order was the responsibility of the French Resident-General, acting on behalf of France, only the latter country could be responsible, and that in any event Tunisia herself could not be held liable.

Held: that under the terms of the Treaty of May 12, 1881 (to which full reference is made below), which established the French protectorate over Tunisia, the duty to maintain law and order in that country remained vested in the State of Tunisia, a sovereign State, and that accordingly only the latter State could be liable in law; but that on the facts the plaintiff had failed to establish that he had been the victim of a delict in respect of which State responsibility could be held to exist.

The Court said: " By the Treaty of May 12, 1881, between France and Tunisia, which established the French Protectorate, the Bey of Tunisia agreed that ' the French authorities shall occupy such places as they may deem necessary to re-establish order and security at the frontier and around the coast ', and that such occupation should ' cease when the French and Tunisian military authorities shall have agreed, by mutual consent, that the local administration is capable of guaranteeing the maintenance of order ' (Article 2). It was expressly provided, as between the High Contracting Parties, that ' the government of the French Republic undertakes to lend constant support to His Highness the Bey of Tunisia against any danger that might threaten the person or dynasty of His Highness or that might endanger the tranquillity of His States '. It follows that from the beginning of the Protectorate the forces of the French Republic were put at the disposal of the State of Tunisia, on whose behalf they acted from then onwards. In other words, the forces of the French Republic were only an element of support lent by the Protecting Power to the Protected Power, in the interest of the latter, and without thereby infringing the sovereignty of the State of Tunisia. It was in the spirit of the said Treaty that the Decree of the Bey of April 17, 1897, linked the police of the City of Tunis and of the other municipalities to the State of Tunisia. The latter paid the police force out of its budget, and the management thereof was entrusted to a director of public security who was appointed by decree of the Bey, on the recommendation of the Bey's Prime Minister. The director of police ' has power to make such provision, for the whole or part of the territory of Tunisia, as may be necessary to maintain or re-establish public order ' (Article 1 of the Decree of the Bey dated October 30, 1941). In so far as concerns the security of the country, the Tunisian gendarmerie itself was placed administratively under the authority of the director of police (Ordinance of April 21, 1944). It is true that the Bey's Decree of September 30, 1940, that of April 14, 1941, and finally that of April 20, 1944, which is now in force, make the Resident-General directly responsible for the security forces. On the other hand, by virtue of the enactments referred to, and in particular the Decree of April 20, 1944; where the respresentative of the French Republic acts in the interest of maintaining law and order in Tunisia, he does so by way of delegation from, and on behalf of, the Bey . . . . In view of the fact that the duty of maintaining the internal security of Tunisian territory thus rests, by virtue of the sovereign decision of the Bey, on high Tunisian officials who derive their authority directly from the Resident-General, it is logical that the maintenance of public order does not appear among the functions of Ministers and of the Secretary-General of the Tunisian Government, as set out in the Decree of the Bey of February 8, 1951, governing the general administration of Tunisia. The fact that general or special police powers are exercised by the Resident-General and the military authorities deriving their authority, as high French officials, directly from the central authority of the French Republic, does not preclude the responsibility of the State of Tunisia in the present case, because legally—and this must be stressed again—the Resident-General and the military authorities act by way of delegation from Tunisian sovereignty."

The Court then proceeded to deal with the facts of the case and arrived at the conclusion that the authorities had not failed in their duty to maintain law and order. On that finding of fact the Court dismissed the plaintiff's action.

[Report: *Dalloz*, 1953, *Jurisprudence*, p. 564.]

IV.—Mandated and Trust Territories

i.—Sovereignty over Mandated and Trust Territories. Status of Mandated and Trust Territories

Mandated Territory—Nationality in—No Palestinian Nationality after Termination of Mandate—Validity of Palestinian Passport after Termination of Mandate—Acquisition of Israel Nationality by Former Palestinian Citizen.

NAQARA *v.* MINISTER OF THE INTERIOR.

Israel, Supreme Court sitting as the High Court of Justice.
(Agranat, Silberg and Landau JJ.)
October 16, 1953.

THE FACTS.—This was an application for an order of *mandamus* calling upon the respondent to acknowledge the Israel nationality of the petitioner and to issue an Israel passport to him. The petitioner was born in 1912 in the town of Acre. From 1919 he lived in Haifa, where he practised as an advocate from 1936 to 1948. He was during that period a Palestinian citizen and the holder of a Palestinian passport. On April 19, 1948, he proceeded to Acre in order to conduct several cases being heard there. On April 22, Haifa was occupied by Hagana, the Jewish defence force. On April 25, the petitioner unsuccessfully attempted to return. About this time the commander of the " Arab Liberation Army " (a non-regular force) requested the inhabitants of Acre to leave that city; and as the road to Haifa was cut the petitioner proceeded, on April 27, to Lebanon. On May 15, 1948, the independence of Israel was proclaimed. On August 10, the petitioner returned via Cyprus to Haifa, where he was taken into custody under the Defence Regulations, being released in November of that year. Since then he resided in Israel. In November 1951 a court having jurisdiction to hear appeals against non-inclusion in the electoral rolls recognized, on the basis of those facts, that the petitioner was a permanent resident of Israel. In November 1952 he applied for an Israel passport, claiming Israel nationality under s. 3 of the Nationality Law, 5712–1952, (*Laws of the State of Israel*, authorized translation from the Hewbrew, vol. 6, p. 50). By that section a person who, immediately before the establishment of the State of Israel, was a Palestinian citizen, shall become an Israel national with effect from the day of the establishment of the State if (1) he was registered on March 1, 1952, under the Registration of Inhabitants Ordinance, 5709–1949 (*Laws of the State of Israel*, vol. 2, p. 103); (2) is an inhabitant of Israel on the day of the coming into force of the Nationality Law (July 14, 1952); and (3) was in Israel from the day of the establishment of the State to the day of the coming into force of the Law, or entered Israel legally during that period. The passport was refused, on the ground that condition (3) of the Nationality Law had not been complied with seeing that the petitioner had not proved that he had entered Israel legally since May 15, 1948.

Held: that the petitioner had not established that his entry into Israel in 1948 was legal. On the other hand, having regard to the decision of the election Court in 1951, the authorities were estopped from denying this in the present case. Accordingly the order *nisi* must be made absolute.

The Court said: " The first question is whether the petitioner is correct in his contention that the fact of his being a Palestinian citizen and the possessor of a Palestinian passport made his entry into Israel legal. This argument is untenable. As was decided in *Hussein* v. *Governor of Acre Prison* (see *International Law Reports*, 1950, p. 112), Palestinian citizenship ceased to exist upon the establishment of the State of Israel. The legal basis of that citizenship, namely, the Palestine Citizenship Orders-in-Council, 1925–1942, was expressly repealed, by section 18 (*a*) of the Nationality Law, with effect from the day of the establishment of the State. The petitioner mentioned subsection (*b*) of that section, by which any reference in any provision of law to Palestinian citizenship or Palestinian citizens shall henceforth be read as a reference to Israel nationality or Israel nationals. Emphasizing the word ' henceforth ', he wants to deduce from it that up to the date of the coming into force of the Nationality Law, Palestinian citizenship continued to exist, at least so as to permit a Palestinian passport to retain its validity. But this is not the correct interpretation of section 18 (*b*). That subsection does not detract from the principle of section 18 (*a*), according to which Palestinian citizenship ceased to exist as from the establishment of the State. The Palestinian passport merely evidenced the citizenship of its holder, and it was not competent to prolong his citizenship. Subsection 18 (*b*) does not relate to the provisions of law which governed Palestinian citizenship, but to the provisions of other laws which mention Palestinian citizenship as a matter already existing on the basis of the law . . .

" Consequently, we find that the petitioner was not an Israel national when he returned to Haifa on August 10, 1948, neither by virtue of his previous Palestinian citizenship nor by virtue of his Palestinian passport. We will assume, in his favour, that he ought to have been regarded on that day as a resident who had temporarily left the country. On that basis the provisions of the Immigration Ordinance, 1941, were applicable to him. According to that Ordinance, any resident temporarily abroad who was not furnished with a Resident's Return Visa had to make application either to the Director of the Department of Immigration or to a British Consul or Passport Control Officer. (For the adaptation of these terms to the equivalent Israel official, see section 14 (*b*) of the Law and Administration Ordinance, 5708–1948.) It is clear from the Immigration

Ordinance that such an application should have been submitted abroad even before the petitioner reached Haifa. He could have made the application to an Israel Consul (the Consul then nearest to Cyprus was in Italy). Non-compliance with this condition was also an offence under section 12 (1) of the Immigration Ordinance. The petitioner did not acquire a Return Visa, and therefore it appears that he did not enter Israel legally."

The petitioner's second argument was that the respondent was estopped from denying that he (the petitioner) entered Israel legally, because in an election appeal heard in 1951 it was decided that he had entered Israel legally. The facts regarding the petitioner's entry into Israel, as brought to the notice of the Court which heard the election appeal, were identical with those which formed the basis of the present case. On this argument the Court held that the respondent was now estopped from denying that the petitioner had entered Israel legally; and for this reason he was entitled to recognition as an Israel national under section 3 of the Nationality Law.

[Reports: *Piskei-Din*, vol. 7 (1953), p. 955; *Pesakim Elyonim*, vol. 14 (1954), p. 35.]

See also *Kaiwan* v. *Minister of Defence*, decided by the same Court on March 9, 1954, in which it was *held* that a person who had been illegally expelled from Israel was always entitled to return to the country without permission and was to be regarded as one who had never left the country. Consequently, the authorities could not look upon such a person who returns to Israel as not having entered Israel legally, and a decision of the Court, in such circumstances, that the person is legally in the country is a decision *in rem* since it determines the status of the individual as a legal resident. As such, the decision binds the authorities and the courts, and is sufficient to establish the existence of the conditions of section 3 of the Nationality Law. [Reports: *Piskei-Din*, vol. 8 (1954), p. 301; *Pesakim Elyonim*, vol. 15 (1954), p. 24.]

Mandated Territory—Nationality in—Naturalization under Law of Palestine as Effecting Expatriation under Law of the United States of America.

See p. 251 (*Kletter* v. *Dulles*).

C—NEUTRALIZATION AND DEMILITARIZATION

Neutralization—Of States—Switzerland—Maintenance of Neutrality.

In re ARNOLD.

Switzerland, Federal Criminal Tribunal. April 28, 1953.

THE FACTS.—The accused was charged with having, contrary to Articles 266 *bis* of the Penal Code, made contact with foreign organizations abroad and made false assertions with a view to provoking activities directed against the safety of Switzerland, in that he made a speech at a Congress of the Communist International Organization of Journalists, held in Budapest in May 1951, in which he spoke of the spread of American "war propaganda" in Switzerland. In that speech he had implied, *inter alia*, that Switzerland had given up its independence and neutrality.

Held: that the accused must be convicted.

With regard to his allegations concerning Swiss neutrality, the Court said: "Switzerland maintained its neutrality after the Second World War. It has not concluded any military alliance. In particular, it has never joined the North Atlantic Treaty Organization, or sought membership of that organization, or even considered such membership. Visits of foreign officers do not violate the obligations of a neutral State. Switzerland cannot be blamed for declarations made abroad to the effect that Switzerland would be a potential ally in time of war. Moreover, the accused cannot invoke the fact that opinions may be divided on the opportuneness of Switzerland's membership of the Organization for European Economic Co-operation and the European Payments Union, and the various decisions of the Federal Council concerning the supervision of imports and exports. The accused, while in Budapest, did not simply make use of the right, which every citizen has, to criticize the Swiss membership of O.E.E.C. and E.P.U., but asserted that the country had given up its independence and neutrality . . ."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 79 (1953), IV, p. 30.]

D—RECOGNITION

[*See also above*, A, IV, Recognition of Acts of Foreign States and Governments; *and* PART IV, JURISDICTION: A, I, Territorial.]

I.—Of States

States—Recognition of—*De jure* and *de facto* Recognition—*De facto* Recognition by Exchange of Ambassadors—Independence of India—Recognition by United States of America—Proof of Indian Citizenship.

MURARKA *et al.* v. BACHRACK BROS., INC.

United States, District Court, Southern District, New York.
December 1, 1952, and *April* 10, 1953.

Court of Appeals, Second Circuit. August 3, 1954.

THE FACTS.—This was an action for breach of contract for the sale of parachutes. At the time when the complaint was filed, federal district courts had jurisdiction over controversies between "Citizens of a State and foreign States, citizens or subjects", provided a requisite amount was in controversy. A witness, called by the plaintiffs, testified that each of the plaintiffs had lived in some part of India. On the defendant's motion to dismiss for want of jurisdiction,

Held (by the District Court): that the complaint must be dismissed without prejudice. The testimony given was insufficient to establish that each plaintiff was " an alien and a subject of Great Britain " as alleged in the complaint. [Report: 108 F. Supp. 597.]

The plaintiffs thereafter established their citizenship by the requisite preponderance of evidence, and the Court found that " each plaintiff was an alien, British Indian citizen and subject of Great Britain." The decision of the Court dismissing the action without prejudice was therefore set aside. A judgment was rendered for the plaintiffs on the merits of the case. [Report: 111 F. Supp. 295.]

On appeal,

Held (by the Court of Appeals): that the judgment must be affirmed in part and reversed in part and remanded. As of the date of the filing of the complaint in this action, July 14, 1947, the United States had not given *de jure* recognition to India, but the international status of that area at that time was such as to give Indian citizens the right to sue in United States federal courts. An exchange of ambassadors between India and the United States amounted to *de facto* recognition of India by the United States. The certificate of the Indian Vice-Consul at New York that the plaintiffs were Indian citizens was sufficient to establish the citizenship of the plaintiffs.

The Court said: " It is not altogether clear whether the finding that each plaintiff was a ' British Indian citizen ' was regarded by the Court as an alternative basis for jurisdiction, rather than merely the foundation for the finding that each was a ' subject of Great Britain.'[1] Be that as it may, the status of India at the time the complaint was filed (July 14, 1947), and certainly at the time of the amendment of the complaint (January 14, 1953), was such that in our opinion, the finding that each plaintiff was a ' British Indian citizen,' if supported by the evidence, was a fully adequate basis for jurisdiction, even though in our view the evidence did not warrant the finding that each plaintiff was a ' subject of Great Britain.' As to the latter finding, it is sufficient to say that British law was neither pleaded nor proved, see *Chicago Pneumatic Tool Co.* v. *Ziegler*, 3 Cir., 1945, 151 F.2d 784, 793; *United States ex rel. Zdunic* v. *Uhl*, 2 Cir., 1943, 137 F.2d 858, 861[1]; *Iafrate* v. *Compagnie Générale Transatlantique*, D.C.S.D.N.Y. 1952, 106 F.Supp. 619, 622, that satisfactory evidence of the place of birth of the several plaintiffs was lacking, and that no other evidence that any of the plaintiffs was a British subject as a result of naturalization or otherwise was offered at the trial.[2]

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[1] Favoring the view that the Court intended " British Indian citizen " as affording an independent ground of jurisdiction—*i. e.*, that the plaintiffs were citizens of what was formerly known as British India—is the fact that plaintiffs' counsel after first proposing to amend the complaint so as to allege that " each plaintiff is an alien *and* a Britain [*sic*] Indian citizen *and* a subject of Great Britain," then stated that he wished to " omit the words, ' and a subject of Great Britain ' ; because I am not sure of that status." And further, the Trial Court found: " At the time the complaint was filed the Government of India was an interim one *recognized as such by the United States* with an ambassador to Washington whose credentials were signed by His Majesty, King George the Sixth of the United Kingdom."

"Our first inquiry must be as to the status of India at the time of the filing of the complaint and thereafter. We may take judicial notice of the essential historical facts. The long standing aspirations of both Hindus and Moslems in India to achieve political independence from Great Britain—seriously embarrassed by the internal divisions between them—are a matter of common knowledge. Following the end of World War II, the British Government made various efforts to bring the contending factions together. The report of the Cabinet (Cripps) Mission issued on May 16, 1946, recommended the formation of an interim government to work out a constitution acceptable to both major political parties, looking toward the political separation of India from Great Britain. An Interim Government was formed on September 2, 1946. By February 20, 1947, it was apparent that the Interim Government was failing to achieve the hoped for unity between Hindus and Moslems, but the British Government nevertheless on that date announced its firm intention to transfer power to some Indian authority by June 1948. See Statement on Indian Policy delivered February 20, 1947, to Parliament by the Prime Minister.

"The continued refusal of the Moslem political leaders to participate in the effort of the Constituent Assembly to draft a constitution led to the announcement by the British Government on June 3, 1947, that the Moslem areas of India would be given an opportunity to determine, by referendum, whether they would participate in the labors of the Assembly or whether they would work out their own constitution and become an independent nation separate from the rest of India. See Statement of Indian Policy delivered June 3, 1947, to Parliament by the Prime Minister.

"Finally, on July 18, 1947, the British Parliament enacted the Indian Independence Act (10 & 11 Geo. VI, c. 30, Public General

[[1] See *Annual Digest*, 1943–1945, Case No. 121.]

[2] See British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. V, c. 17), 18 Chitty's Statutes, p. 9 (6th ed., 1914–1916), as amended in 1918, 1922, 1933 and 1943; for the status of subjects of the native Indian rulers, as distinguished from citizens of British India, see Jones, British Nationality Law and Practice, pp. 274, f. n. 1, 291 (1947), and Jones, Who Are British Protected Persons ?, XXII British Year Book of International Law, pp. 122 et seq. (1945).

Since the defendant objected to our considering the certificate of the British Consul in New York, which plaintiffs' counsel tendered at the oral argument of this appeal, to the effect that plaintiffs were British subjects on July 14, 1947, we have paid no attention to that certificate.

Acts of 1947, Vol. 1, p. 236) under which power would be transferred to two new Dominions—Pakistan (Moslem) and the Union of India (Hindu), which included Delhi where the plaintiffs were engaged in business—on August 15, 1947. On that date the Union of India became a self-governing member of the British Commonwealth of Nations. On November 26, 1949, the Union of India adopted a Constitution, effective January 26, 1950, under which it became a sovereign republic, but elected to continue as a member of the Commonwealth of Nations.

" It appears from a State Department communication which was before the lower Court that although our Government did not formally recognize India as an independent nation until August 15, 1947, it took steps to recognize the Interim Government of India after its formation on September 2, 1946, by receiving in February 1947 India's first ambassador, whose credentials were signed by the British Crown, and accrediting the first United States ambassador to India in April 1947.

" The parties have not directed our attention to any further act of recognition which occurred after the exchange of ambassadors, and we view the statement in the State Department communication to the effect that India did not become independent until August 15, 1947, as being rather in the nature of a legal conclusion which adds little more to the significance of the already existing relations between that Government and our own.

" Whether the position of India be viewed as of July 14, 1947, when the complaint was filed, or as of January 14, 1953, when the complaint was amended, we think that at both times its international status was such as to give Indian citizens the right to sue in our Federal Courts. True, as of July 14, 1947 our Government had not yet given India *de jure* recognition, but its exchange of ambassadors in February and April 1947 certainly amounted at least to *de facto* recognition, if not more. To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India's ties with Great Britain were in the process of withering away (see U. S. Foreign Relations 1913, p. 102), which was followed a month later, when partition took place between India and Pakistan, by the final severance of India's status as a part of the British Empire. The significance of these events is not lessened by the fact that the credentials of the first Indian Ambassador to the United States were signed by the British Crown. We think that in its setting that act is more properly to be regarded as a mere expediency rather than as a significant act of sovereignty in the usual sense of that term. Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States.

" If we are to look only to formalities, it is beyond dispute that

India became fully independent on August 15, 1947, when its status as a part of the British Empire finally ended. This was one month after the complaint was filed and five and a half years before the complaint was amended on January 14, 1953. Had the complaint, as amended, been first filed on that date, there would have been no room for argument but that India had long since been recognized by the United States as an independent power in every sense of the term. Since the six-year New York statute of limitations, N.Y.Civil Practice Act § 48(1), which governed this cause of action, had not run at the date of the amendment—the defendant's breach of the contract having occurred on February 25, 1947—it is clear that the complaint, as amended, could have been filed originally at that time. And in view of the fact that the dismissal of the original complaint was " without prejudice," rather than " with leave to amend," we would in any event be disposed to treat the amendment as in effect the filing of a supplemental complaint on January 14, 1953, at which time India was unquestionably an independent foreign power fully recognized by the United States. F.R.C.P. 15(d), 28 U.S.C.A.; see *Genuth* v. *National Biscuit Co.*, D.C.S.D.N.Y.1948, 81 F.Supp. 213, 214, appeal dismissed for lack of jurisdiction, 2 Cir., 1949, 177 F.2d 962.

" The remaining question as to jurisdiction relates to the sufficiency of the proof that the plaintiffs were citizens of India. This proof consisted of a certificate of the Indian Vice-Consul at New York that the plaintiffs were ' British India Citizens in July 1947 and are now Indian Citizens.' The issuance of this certificate was authorized by the Ministry of External Affairs of India, which in turn acted upon a certificate of the District Magistrate at Delhi, India.

" Clearly this evidence, if competent, was sufficient to prove the Indian citizenship of the plaintiffs. And we think the evidence was competent. What was sought to be proved was not a foreign record, but a determination of the Indian Government, that the plaintiffs were Indian citizens. The requirements for proof of foreign public records contained in 28 U.S.C.A. § 1741 and §§ 329 and 398 of the New York Civil Practice Act have no application here. The Consular certificate was properly authenticated by the Vice Consul who made it, who also testified that he had acted under instructions from his Government. And the plaintiffs are entitled to the presumption of regularity which has long attached to the procedures of foreign governments and agencies. See *United States* v. *King*, 1845, 3 How. 773, 44 U.S. 773, 784–786, 11 L.Ed. 824; *Boissonnas* v. *Acheson*, D.C.S.D.N.Y.1951, 101 F.Supp. 138, 153. It is the undoubted right of each country to determine who are its nationals and it seems to be general international usage that such a determination will usually be accepted by other nations. See Convention on Certain Questions Relating to the Conflict of Nationality Laws, Signed at the Hague, April 12, 1930, Arts. 1 and 2; Briggs, The Law of

Nations, pp. 458–60 (2d ed. 1952); Dept. of State Bull. XXII, No. 559, pp. 433–441 (March 20, 1950); *Stoeck* v. *Public Trustee*, 2 Ch. 67 (1921).[1] While neither side has given us a judicial decision involving such proof of foreign citizenship as was made here, we entertain no doubt on principle that the proof was competent. Cf. Decision No. 1 of British-Mexican Claims Commission in *Great Britain* (*Lynch Claim*) v. *Mexico*. Decisions and Opinions of the Commissioners, October 5, 1929 to February 15, 1930, pp. 20–23.[2] Our statutes provide for the issuance of certificates of United States nationality to others than naturalized citizens, by the Secretary of State, or by officials to whom he has delegated such power, for use in foreign judicial or administrative proceedings, 8 U.S.C.A. §§ 1502, 1104, and we see no reason why our courts should not give presumptive credit to similar certificates of foreign governments. The defendant has cast no cloud on the validity or accuracy of the consular certificate itself.

" We conclude that the District Court had jurisdiction over this action."

(The Court thereafter dealt with the question of damages for the breach of contract and determined that the case must be remanded for recomputation of the damages.)

[Report: 215 F.2d 547.]

NOTE.—The above case is noted in *Fordham Law Review*, 24 (1955), p. 142.

V.—Of Annexation

Recognition—Of Annexation—Incorporation of Annexed Territory in Foreign State—Recognition of Acts of Belligerent Occupant—Recognition of Merger of Lithuania with Soviet Russia—Occupation of Lithuania by Germany—Legislative Measures of Occupant.

LESSER *v.* ROTTERDAMSCHE BANK AND KLING AND OTHERS.

Holland, District Court of Rotterdam. December 30, 1953.

THE FACTS.—The plaintiff, a woman of German nationality, had married Zivas, a Lithuanian national, at Riga (Latvia) on December 22, 1935. Zivas died on September 30, 1953, in Kaunas (Lithuania). His estate included a debt from the defendant Bank, and also a number of gold coins which he had deposited with that Bank. The plaintiff demanded payment of the debt and delivery of the coins, on the ground that she was Zivas's widow and his universal testamentary heir. Kling, a relative of Zivas, intervened, and contended that under Lithuanian law the brothers, sisters and nieces of Zivas were entitled to the estate as heirs *ab intestato*. They denied that the plaintiff was the lawful surviving spouse and testamentary heir. The plaintiff maintained that it was not Lithuanian law which governed succession to Zivas's estate, but Soviet Russian law, which excludes brothers and sisters of the deceased, and their issue, from inheriting. The defendant maintained that in view of the non-recognition by Holland of the incorporation of Lithuania into Soviet Russia, Soviet Russian law could not be applied. Other relevant facts relating to the changes of status of Lithuania and their recognition by Holland are set forth in the *Held* below.

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[1] [See *Annual Digest*, 1919–1922, Case No. 156.]

[2] [*Ibid.*, 1929–1930, Case No. 134.]

Held: for the plaintiff. By virtue of the principles of international law the Court was not free to decide on the legality of the elections held for the Parliament of Lithuania after that country had been occupied by the U.S.S.R. in 1940. As both in 1940 and in 1943 the Soviet Russian Civil Code obtained in Lithuania, this Code governed the succession.

As regards the question, which law governed the succession, the Court said: " Lithuanian law in this case is the legislation of the former Republic of Lithuania, which existed from the end of the First World War until the middle of 1940. As far as the law of inheritance is concerned, Lithuanian law is different in various parts of the Republic. Even prior to 1940 Zivas had his residence in Kaunas [the capital of Lithuania], where he was domiciled when he died. The republic of Lithuania was occupied by the Union of Soviet Socialist Republics in the middle of June 1940. During that occupation, elections were held in July 1940 for a new Lithuanian Parliament, which in the same month decided that Lithuania should become a member State of the U.S.S.R. By a Law of August 3, 1940, the Soviet Republic of Lithuania was incorporated in the U.S.S.R. By a Decree of the Praesidium of the Supreme Soviet of the U.S.S.R. of September 7, 1940, Soviet Russian nationality was, as from August 3, 1940, granted to all nationals of the Soviet Republic of Lithuania then residing in the territory of the U.S.S.R. By a Decree of the said Praesidium of November 6, 1940, the Civil Code of the U.S.S.R. became operative for and was made enforceable in the Soviet Republic of Lithuania. Consequently, the provisions of Russian inheritance law were substituted for those of Lithuanian law. At the end of June 1941, Germany occupied the territory of the Soviet Republic of Lithuania, and incorporated this territory into the " Ostland " (" Eastern Territory ") which they set up. They substituted for the Soviet Russian Code the previous Lithuanian legislation, which once more became operative until the U.S.S.R. armies in the second half of 1944 drove the Germans out of the country. The Government of the Soviet Republic of Lithuania then re-assumed authority. In July 1942 the Netherlands Government in London recognized the U.S.S.R. *de jure*, without any reservation as regards the Baltic States. By virtue of Netherlands law the succession to the estate of a foreigner is in principle subject to the law which in view of the nationality of the *testator* at the time of his demise must be deemed to be his national law. In the event of the deceased being regarded as stateless at the time of his demise, or if it is not possible to determine what was his nationality, succession is subject to the law of his last residence.

" In support of their plea that Lithuanian law ought to be applied, Kling and the other intervenors argued as follows: The territory of Lithuania must be deemed to have been annexed by the U.S.S.R. Admittedly, at present this annexation must be recognized by the Netherlands courts. However, this means that the existence of the Soviet Republic of Lithuania and the binding force of the Soviet Russian Code on the citizens of that Republic are accepted only as from the second Russian occupation in 1944. Only since then has there existed a situation which is of sufficient duration to merit judicial recognition. It is immaterial that the Netherlands Government recognized the U.S.S.R. *de jure* in 1942. For such recognition does not imply recognition of the frontiers of the U.S.S.R. seeing that these could not yet be considered as definitely established at the time. There was no question of the stability of the U.S.S.R. boundaries in the Lithuanian territory then occupied by Germany. The U.S.S.R. territorial limits can be considered as including the Lithuanian territory only as from 1944. The laws introduced in that territory in 1940 during the occupation by the U.S.S.R. are to be deemed foreign occupation law. When that occupation law was abolished in 1941 during the German occupation—which by the law of nations was just as illegal as was the first Russian occupation—Lithuanian law was re-established to a certain degree. Lithuanian law therefore applied at the date of the death of Zivas in Kaunas. In the opinion of the inhabitants, it was the law that obtained at that time. Lithuanian law being the law of Zivas's last residence, it governed the succession of his estate, in case Zivas, who had been " ausgebürgert " (denationalized) as a Jew by the German occupying Power, was to be regarded as stateless in 1943. The Soviet Russian Civil Code cannot be regarded as the national law of Zivas seeing that the Decree of September 7, 1940, by which Soviet Russian nationality was granted to him, must be considered to be foreign occupation law. The Soviet Code had no binding force in Lithuania in 1943, in particular because, by virtue of a rule of international law, nationality cannot be forced upon anyone against his will.

" This plea of Kling and the other intervenors cannot therefore be sustained. Whether a situation is a lasting one or not can only be established after the event. When considering a situation *ex post facto*, its origin must be kept clearly in mind. The present Soviet Republic of Lithuania is part of the Union of Soviet Socialist Republics. It originated in a vote of the Lithuanian Parliament to join the U.S.S.R. and in the Law of August 3, 1940, by which that decision came into effect. It is irrelevant for the intervenors to argue that effect must be denied to that decision of Parliament on the ground that the elections leading to the constituting of that Parliament were held under stress of the occupation by the U.S.S.R. According to international law, the legality of elections held in another State and of the actions of a Parliament constituted as a result of such elections is not a question for Netherlands Civil Law courts to decide. Therefore the Government of the Soviet Republic of Lithuania constituted in 1940 must be deemed to have been legitimate. The same applies to legal provisions enacted by it, or by the Government of the U.S.S.R. on its behalf, because of the Union relationship. . . . The *de jure* recognition of the U.S.S.R., considered in itself, is not decisive of the question whether the Netherlands courts have to consider legislation introduced in the Soviet Republic of Lithuania in 1940 as retrospectively valid. That recognition seems, however, to favour an affirmative answer to that question; it must be deemed to include a recognition of the law previously enacted by the U.S.S.R. by which the Soviet Republic of Lithuania was incorporated into the Soviet Union. This leads to recognition of the legislation introduced in 1940. The mere fact that, during the war which the U.S.S.R. waged in 1942 against Germany, Lithuanian territory was occupied by Germany, cannot be interpreted as nullifying the political relationship between the U.S.S.R. and the Soviet Socialist Republic of Lithuania. The intervenors do not take into account that what they call the first factual annexation by the U.S.S.R. was not merely a fact; it was confirmed by legislative measures, and those measures bear upon the significance to be attached to the *de jure* recognition of the U.S.S.R. by the Netherlands Government. The intervenors ignore the fact that the circumstances to which they refer as the second annexation throw a further light on the first annexation and that, viewed from that standpoint, the present Soviet Republic of Lithuania is the same as the one constituted in 1940. This Republic joined the U.S.S.R. in 1940 and the decision to that effect was taken by the competent body. The validity of that decision must be acknowledged. It cannot, therefore, be maintained that there was merely ' factual annexation '. The laws introduced in the Soviet Republic of Lithuania in 1940 must be considered by Netherlands courts as the law then obtaining. It therefore also follows that by virtue of the Decree of September 7, 1940, Soviet Russian nationality was granted to Zivas. The principle of international law that nationality cannot be forced upon a person against his will cannot apply here. Zivas could have manifested his unwillingness to accept Soviet Russian nationality. This he could have done by leaving the territory of the States belonging to the U.S.S.R. with a view to withdrawing himself from their power. However, no such far-reaching significance can be attached to the said principle of international law that the citizens of the former

Republic of Lithuania who were subject to the power of the Soviet Republic of Lithuania—to which legitimacy cannot be denied—could withdraw themselves from the nationality laws of that Republic on the mere ground that they were disinclined to accept the consequences of these laws. In 1940 the Soviet Russian Civil Code was Zivas's national law as well as the law of his residence.

" It remains to be considered whether the legislative measures taken by the German authorities affect the legal situation as set out above. These measures must be deemed to be foreign occupation law within the Soviet Republic of Lithuania. There is no evidence that the Government of the Soviet Republic of Lithuania, after it resumed the exercise of authority in 1944, gave any effect to these measures. Therefore, the fact that these measures are occupation law disqualifies them from being used for testing the question who are entitled to that part of Zivas's estate which is the subject of the present proceedings. The fact that those measures had for their purpose the replacing of the legislation of the former Republic of Lithuania by that of the Soviet Republic of Lithuania, is not relevant, because they did not, as the intervenors contend, have the character of restitutive legislation. For, from a legal point of view, it must be recognized that the Soviet Republic of Lithuania had been constituted prior to the German occupation.

" German occupation law had by no means the effect of restoring to Zivas rights which he might have lost through the legislation of the Soviet Republic of Lithuania. Zivas had, as the intervenors allege, been " ausgebürgert " (denationalized) by the occupation legislation because he was a Jew. This in itself is sufficient ground for accepting that Zivas did not lose Soviet Russian nationality by virtue of German occupation law, and that his national law thus remained the same. The occupation law purported to vest him with another nationality, but it is certain that the German authorities were not free to deprive citizens of occupied territories of their nationality. The fact that the earlier Lithuanian law was again applied in 1943 and was held to be valid by the inhabitants of the occupied territory as the law then obtaining, cannot deprive the German measures, by which the former Lithuanian legislation was substituted for the Soviet Russian Civil Code, of their character of occupation law. The results of the German measures are questions of fact, which—apart from the question whether they ought to be taken into account in deciding on legal measures taken in the Soviet Republic of Lithuania during the German occupation—cannot be deemed in themselves to be decisive of the question which law must be applied by Netherlands courts for the determination of a certain juridical fact, *i.e.*, the demise of Zivas, which occurred in 1943 within the German-occupied territory of the Soviet Republic of Lithuania. From the mere fact that Lithuanian law was then applied there and was perhaps therefore considered by the citizens of the occupied territory to be the law then obtaining, it by no means follows that this was rightly so considered. No effect must be given to German occupation law which had not been recognized by the lawful Government of the Soviet Republic. Consequently, in 1943 as well as in 1940 the Soviet Russian Civil Code was the national law of Zivas and also the law of his residence."

On the basis of Soviet Russian law the Court concluded that the plaintiff, and not the intervenors, was entitled to the inheritance, on the assumption, however, that the plaintiff was the lawful spouse of Zivas. With regard to the latter point, the intervenors claimed that, the plaintiff having, under the Repatriation Convention concluded between the U.S.S.R. and Germany, returned to Germany early in 1941, she had never acquired Lithuanian nationality by marriage. The Court rejected this plea and said: "The circumstances in which this Convention of January 10, 1941, came into force justify the assumption that many persons who were not of German nationality attempted to leave the Soviet Republic of Lithuania in reliance on that Convention. The plaintiff may well have succeeded in such an endeavour because of her previous nationality. For the purpose of determining her nationality, the same importance can hardly be attached to the fact that she left that country for Germany at the beginning of 1941 as to the fact that the passport issued to her at the beginning of 1939 contained the statement that her nationality was Lithuanian."

[Report: *N.J.*, 1954, No. 769.]

Recognition—Of Annexation—Effects of Non-recognition—Non-recognition by United States of Annexation of Lithuania by Soviet Russia.

See p. 193 (*Latvian State Cargo and Passenger Steamship Line et Al.* v. *United States*).

Recognition—Of Annexation—Non-Recognition—Effect of.

See p. 180 (*Republic of Latvia Case*).

E—STATE SUCCESSION

I.—Succession to Rights

State Succession—Succession to Rights—Property of Municipalities Transferred to State—Meaning of Term "*Biens communaux*"—Respect for Acquired Rights—Boundaries—Land Boundaries—Adjustment of Frontiers under Peace Treaty—Passing of State and Other Public Property with Ceded Territory—Substitution of Award of Conciliation Commission for Apportionment Agreements Prescribed by Treaty—Retroactive Effect of—Title of Annex of Treaty as Guide to Meaning of Provisions—Effects of Territorial Changes on Property Rights—Departure by Mutual Agreement from Terms of Treaty—Necessity for Uniformity in Application of Treaty—Powers of Conciliation Commission—Equitable Principles and Rules of Good Faith—Question of Compensation Adjustments on Apportionment—Exclusion of Remedies Not Stipulated in Treaty.

FRONTIER (LOCAL AUTHORITIES) AWARD.

Franco-Italian Conciliation Commission. December 1, 1953.

(Perier de Feral, Sorrentino, Bolla.)

THE FACTS.—The Treaty of Peace of February 10, 1947, between the Allied and Associated Powers and Italy, which came into force on September 15, 1947, contains an Annex, XIV, entitled "Economic and Financial Provisions relating to Ceded Territories". Under para. 1 (1) of this Annex:

> "The Successor State shall receive, without payment, Italian State and para-statal property within territory ceded to it under the present Treaty, . . ."

and para. 1 (2) provides that

> "The following are considered as State or para-statal property for the purposes of this Annex: movable and immovable property of the Italian State, of local authorities and of public institutions and publicly owned companies and associations, as well as movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations."

Para. 18 (1) of the Annex provides:

> "Italy and the Successor States shall conclude agreements providing for a just and equitable apportionment of the property of any existing local authority whose area is divided by any frontier settlement under the present Treaty, and for a continuance to the inhabitants of necessary communal services not specifically covered in other parts of the Treaty."

As a result of modifications of the frontier made by Article 2 of the Treaty of Peace in the Little St. Bernard Pass, the Mont

Cenis Plateau, Mont Thabor-Chaberton, and the upper valleys of the Tinée, Vesubie and Roya rivers, part of the common property of a number of Italian communes passed under French sovereignty while the inhabitants of the communes remained under Italian sovereignty; in other communes the reverse was effected; other communes again were split up in various ways: all this raised a number of problems. The French and Italian Governments, finding themselves unable to agree on these questions, decided at the Conference of Santa Margharita in February 1951 (confirmed by an exchange of *notes verbales* on September 27, 1951, between the Italian Minister of Foreign Affairs and the French Ambassador at Rome) to submit the question of the allocation of the property of the frontier communes whose areas had been cut by the new frontier, to the Conciliation Commission. The Commission was given full power to settle, if need be, on principles of equity and having regard to the interests of the local populations, the questions which would be put before it. To that end, the Commission had the power, if it should deem it necessary, to examine on the spot the property under discussion.

The Commission made a number of detailed recommendations concerning the exact line of the frontier and apportionment of rights of pasturage, woods, forests, alps, and other rights, in some cases by the creation of *droits d'usage* (easements) across the frontier. The Commission also heard argument and reached certain decisions on questions of law, to which this report is confined.

The two main contentions on behalf of the Italian Government were, first, that para. 1 of Annex XIV could not be taken literally and interpreted so as to transfer to the "Successor State" as such the ownership of the property of "local authorities and of public institutions and publicly owned companies and associations"; such a consequence would entail the suppression of local authorities. Communes in the ceded territory would pass to the new State while retaining their property. When para. 1 provides that the Successor State shall receive, without payment, Italian State and other public property (including that of local authorities) within territory ceded by it, the paragraph does not refer—at least as regards the property of local authorities—to a State succession in the ownership of the said property, but to an integration of the latter in the juridical order of the Successor State. It is inconceivable that the intention of the Treaty of Peace was to transform into *domaniaux* (eminent domain) property belonging to local authorities, which are bodies quite distinct from the State. Hence para. 18 is the application of a general principle to a particular case. Given that local authorities on ceded territory retain ownership in their property, while becoming part of a new State, it follows that, if they are divided [*démembrées*], each new part should receive a portion of that property. Paragraph 18 lays down the criteria on the basis of which the partition should be effected. These criteria take no account of whether the property is situate on one side or the other of the frontier: what is important is to ascertain whether the property in question is fit and proper to ensure the maintenance of communal services. Another consequence of this principle is that, if the new frontier in cutting across the area of a commune has left or transferred to a State the whole of the collectivity of a local authority, the ownership remains entire and any partition is excluded. The local authority must retain its property, even if that property should henceforth lie on the other side of the frontier.

Secondly, it was contended that paras. 1 and 18 of Annex XIV relate to different hypotheses and deal with each of them in an independent and exclusive manner. Paragraph 18 refers neither to paragraph 1 nor to the principle laid down by it; the idea of partition is quite different from that of cession.

For the French Government, it was contended that the provisions of Annex XIV concerning the devolution of property make a fundamental distinction between two categories: first, State or other public property, in respect of which para. 1 of the Annex stipulates that it shall be transferred at once and without payment to the Successor State, who can then dispose of the property, according to its own laws, in particular by allocating it to frontier communes; and secondly, private property, respect for which is guaranteed by para. 9 of the Annex.[1] "Para-statal" property includes the property of local authorities (see para. 1 (2)). Hence any property which belonged to an Italian commune on September 15, 1947, and which is situated in ceded territory, was transferred, without payment, to France as Successor State; and France, in virtue of her sovereignty, could divide property received from Italian communes between the French communes whose areas were increased as a result of the rectifications of the frontier. Paragraph 18 of the Annex does not derogate from the principle of paragraph 1; it provides a remedy for hardships which might result from that paragraph for local inhabitants whose common possessions have been divided; it makes no provision with regard to such possessions. It merely requires the conclusion of agreements for an apportionment of such rights, which shows that the latter have already devolved by virtue of para. 1. But such rights cannot remain in suspense pending an agreement. They can be apportioned between Italian and French communes, so as to maintain necessary communal services. The rights of pasture and so on are essentials for the life of the commune; and the apportionment must have regard to that fact. But the principle laid down by para. 1 is seen in full force when it comes to drawing up the final account of the partitioning. Property of local authorities (hereinafter called *biens communaux*) situate on French territory and which is now French property should be credited to France or to French communes; similarly with the rare instances where Italian communes of which the administrative centre and a large part of their population have been transferred and which have kept their identity despite change of nationality. On the other hand, Italy should retain *biens communaux* situate in Italy and which have since September 15, 1947, belonged to a commune which has remained Italian, only a fraction of its area having passed to France, leaving its *chef-lieu* in Italy.

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[1] Para. 9 of Annex XIV provides, in part:

"9. The property, rights and interests of Italian nationals permanently resident in the ceded territories at the coming into force of the present Treaty shall, provided they have been lawfully acquired, be respected on a basis of equality with the rights of nationals of the Successor State. . . ."

Held: that the contentions advanced on behalf of the French Government must, in general, be rejected.

The Commission said: " The differences between the two Governments on the interpretation to be given to paras. 1 and 18 of Annex XIV have two important practical consequences. According to the Italian argument, all the *biens communaux* which, as a result of the shifting of the frontier under the Peace Treaty, have come under French sovereignty, while the inhabitants remain in Italy, should remain with the communes. In the French view, such property should be partitioned, under para. 18, between Italy and France, or, more precisely, between the Italian communes and the French communes within the areas of which they now are . . . Secondly, according to the French argument, the devolution of *biens communaux* brought about by para. 1 of Annex XIV, if that can be achieved by an equitable partition, cannot derogate from the right of ownership of France, or of the French communes, over that property. Hence the necessity (which is disputed by the Italian Government) for drawing up an account.

[I. *Implementation by Municipal Law of Object of Treaty. The Property of a Commune Transferred in its Entirety.*—] " The principal argument on behalf of the Italian Government runs counter to the very clear text of para. 1: the Successor State is to receive not only State but also other public property, including *biens communaux*, situated on territory ceded to it. It is for the municipal law of the Successor State to decide the fate (*i.e.*, the final destination and juridical status) of property thus transferred, within the constitution under which it comes as a result of the cession of territory. In the case of a former Italian commune which passes with all its area and all its population to the Successor State, its property, so far as it thenceforth lies within the Successor State, is under the Treaty transferred to that State, which can, of course, allocate them to the local authority which either succeeds the former Italian commune or is its continuation but with a new nationality. The same applies to the property of ' public institutions and publicly owned companies and associations ' as well as 'movable and immovable property formerly belonging to the Fascist Party or its auxiliary organizations'. In all these cases, the owners of the property in question are amenable to the public municipal law of the Italian State—the law which determined their juridical status and that of their property. After the cession, the Successor State, to whom the property has been transferred by the Peace Treaty, determines its fate, either by retaining it or by allocating it to public law corporations amenable to its sovereignty. It could do that either by express enactment or by implicitly recognizing, for example, that the local authority amenable to its sovereignty which has succeeded the Italian local authority shall be regarded definitively as the owner of the property of the latter which was transferred under para. 1 of Annex XIV. *Biens communaux* are treated by that paragraph in the same way as movable and immovable property of the State or para-statal organizations.

[II. *Title of Annex of Treaty as Guide to Meaning of its Provisions. Property Remaining in Italy of Commune Ceded to France.*—] "When one comes to establish the relationship between para. 1 and para. 18 of Annex XIV of the Treaty of Peace, a preliminary question arises. The two paragraphs are placed in the same Annex, which, according to its title, comprises 'Economic and financial provisions relating to ceded territories'. It may be asked, then, whether para. 18 applies, as regards the *biens communaux*, only to property which is in ceded territory. Inasmuch as it applies to *biens communaux* which remain on Italian territory after the adjustment of the frontier effected under the Treaty of Peace, their destiny should follow the provisions of Annex XIV and in particular para. 18 thereof. To take a former Italian commune whose area has been divided by a frontier settlement under the Treaty of Peace, and of which all the villages and hamlets, including the *chef-lieu*, have been transferred to France, except one which has remained in Italy with the larger part of the property of the commune: if para. 18 of Annex XIV does not apply, the only two possible solutions are, to transfer the ownership of all the *biens communaux* situate in Italy to the new French commune or to make them the property of the village or hamlet which has remained Italian. Of these two solutions, the former certainly appears to be unfair to the Italian village or hamlet . . . and the second solution was certainly not intended by the draftsmen of the Treaty. Neither of the two solutions, moreover, finds support in any provision of the Treaty of Peace or of Annex XIV. It must follow, then, that para. 18 of Annex XIV applies, in the conditions mentioned therein, both to *biens communaux* situate on ceded territory and to those which remain in Italy. That argument is supported by the quite general terms of the provision, which do not speak solely of the property mentioned in para. 1. In any event, it is only apparently that para. 18, thus interpreted, goes beyond the limits fixed by the title of Annex XIV;

the cession of territory by one State to another must raise the problem of the destiny of property of the local authorities of the ceded territory, whether or not that property is situated in the ceded territory. What the draftsmen clearly meant in para. 18 is that, in every case of the division of the property of a local authority by a frontier settlement under the Treaty, the destiny of the property of that local authority, whether or not situated in ceded territory, should be reserved for an agreement to be concluded between the two States concerned. Such an agreement must conform to the provisions of para. 18. To limit the apportionment to *biens communaux* situated in ceded territory would be, in many cases, to prevent the apportionment being just and equitable, whatever criterion was adopted for the apportionment of *biens communaux* situated in territory that was not ceded.

[III. *Effects of Territorial Changes on Property Rights. Property Ceded to France of Commune Remaining in Italy.*—] " It is not of importance that the object of para. 18 was not and should not be primarily to mitigate the rigour of the principle laid down by para. 1 regarding the property of local authorities whose area has been divided by a frontier settlement under the Treaty. But for para. 18 a commune the whole of the inhabitants of which—that is, all the villages and hamlets, including the *chef lieu*—remained in Italy while its property passed almost in its entirety to the other side of the new frontier, would have lost that property, even if that had rendered it impossible to maintain necessary communal services, and, therefore, to live.

" It must not be forgotten that the frontier changes imposed on Italy by the Peace Treaty were not dictated by the desire to render more difficult the conditions of existence of the Italian frontier communes. The Allied and Associated Powers had no interest in attaining such an object. It is therefore understandable that, as regards the property of communes whose area has been divided by a frontier settlement under the Treaty, they permitted a derogation from the principle of para. 1 and were, moreover, moved by respect for acquired rights. The most authoritative doctrine, whilst recognizing that the effects of territorial changes upon property rights (*droits patrimoniaux*) are determined in the first instance by the Treaty which stipulates the loss of or accretion to territory to the detriment or the advantage of a State, holds that territorial changes should leave untouched property rights regularly acquired before the change, and in particular recommends the application of that rule to the property rights of communes or other local authorities which are part of the State affected by the territorial change (see §§ 3 and 4 of Resolution II adopted by the Institute of International Law at Siena in its Session of April 17–26, 1952 (*Annuaire*, 1952, II, pp. 471 and 472)). Indeed, [in the present case] on behalf of the French Government it was termed inequitable that para. 18 should require a division of the property of any existing local authority whose area is divided by a frontier settlement under the Treaty.

[IV. *Application of Treaty Provisions to Archives, Documents and Other Property.*—] " From the *biens communaux* which would have to be thus divided under para. 18, ought to be excluded ' archives and documents of an administrative character of historical value '; such archives and documents, even if they belong to a commune whose area is divided by a frontier settlement under the Treaty, pass to the Successor State if they concern the territory in question or relate to property transferred (see para. 1 of Annex XIV); if those conditions are not fulfilled, they are not subject either to transfer under para. 1 or to division under para. 17: they remain the property of the Italian commune. What is decisive for property of this special category is the ideate link with other property or with a territory. This is only mentioned for the record, seeing that in the present case no question has been raised concerning archives or documents.

" Another difference between para. 1 and para. 18 lies in the fact that para. 18 applies, subject to what has been said above, to every kind of property, wheresoever situated, while para. 1 applies solely to property situated within ceded territory and to archives and documents of an administrative or historical value concerning the property or territory in question. Thus, for example, para. 18 applies, as has been shown, to immovable property situate outside the ceded territory; it also applies to debts, although para. 1 does not appear to do so.

" V. [*Interpretation of Disparate Parts of Treaty. The Interrelation of Paragraphs* 1 *and* 18 *of Annex XIV.*]—Apart from archives and documents belonging to communes, Annex XIV regulates property in two different ways: on the one hand, *biens communaux* situate in ceded territory—for them the principle is that of transfer to the Successor State (para. 1); on the other hand, *biens communaux*, wheresoever situated, provided that the commune to which they belong is divided by a frontier settlement under the Peace Treaty—for them, the principle is that of apportionment under an agreement, in accordance with the provisions of the Annex (para. 18).

" In so far as the *biens communaux* referred to in para. 18 are situated in ceded territory, they come within the wider category of *biens communaux* falling under para. 1. The two rules, that of para. 1 and that of para. 18, are different and cannot be applied to the same property. In those conditions, and since the provisions of the Treaty ought to be interpreted as being complementary to each other and as limiting each other, it may be conceded that para. 18 brings about for certain *biens communaux* which would otherwise fall within para. 1, an exception, a derogation from the principle of para. 1 (*i.e.*, the transfer to the Successor State of *biens communaux* situate in ceded territory). The principle is not deprived of all its content by the exception; it remains in any event applicable, without any limitation, to the property of existing local authorities whose area is not divided by a frontier settlement under the Peace Treaty, if, that is to say, it is a local authority whose area has passed completely under the sovereignty of one or several Allied or Associated Powers.

" By virtue of para. 18, on the other hand, para. 1 ceases to have any effect once the property situate in ceded territory of a local authority is caught by the application of para. 18.

" VI. [*Departure by Mutual Agreement from Terms of Treaty. Substitution of Award of Conciliation Commission for Apportionment Agreements.*]—Nothing in the text of the Treaty warrants the assumption that—as argued on behalf of the French Government—the draftsmen of the Treaty intended that the *biens communaux* affected by para. 18 should be submitted to double treatment, first the transfer required by para. 1 and then the apportionment provided for by para. 18. That apportionment, on the contrary, presupposes the existence, at the moment when it comes into effect, of some communal property to be divided. Now, such property would no longer have existed after the transfer to the Successor State of the *biens communaux* referred to in para. 18 and situated in ceded territory, or would have comprised at the most the *biens communaux* which remained in Italy and which belonged to communes divided by the new frontier. It is, indeed, admitted on behalf of the French Government that para. 18 ought to permit the return (against payment, it is true) to Italian communes of *biens communaux* which have passed into French territory. If the draftsmen of the Treaty had had the intentions attributed to them by the French Government, they would probably not have spoken in para. 18 of apportionment, but rather of retrocession, in certain instances, of property transferred to the Successor State under para. 1. In any event, it would have been simple for them to reserve in para. 18, by a mere cross reference, the effects of para. 1. They were not unmindful of the relation between para. 18 and the other provisions of the Treaty: they reserved the public communal services expressly referred to by other provisions of the Treaty, which includes para. 1 of Annex XIV as regards archives.

" Although paras. 1 and 18 both use the future tense (' The Successor State shall receive . . .', ' Italy and the Successor States shall conclude agreements . . .'), para. 1 provides for a transfer which must operate at the moment when the Treaty comes into force, while para. 18 envisages an agreement which can and even, very probably, should be concluded at a subsequent time. But that is explained quite naturally by the impossibility for the draftsmen of the Treaty to establish in detail a just and equitable apportionment of the property of the local authorities referred to in para. 18. It took six years after the coming into force of the Treaty to bring to light the factual circumstances which could and should be taken into account on the apportionment. On the international plane as on the plane of most municipal private law legislation, parties who are at one on principal matters may reserve for subsequent agreement certain secondary points. The Treaty is not rendered imperfect, or ineffective, even if no agreement is concluded. There would then be a case for having recourse to [an international tribunal] to seek some method which would replace the agreement which has proved impossible. In this case, the two Governments concerned have not failed to seek, by common accord, such methods; they decided at Santa Margharita, in February 1951, and then in greater detail at Rome on September 27, 1951, to replace the agreement by an award of the Conciliation Commission set up under Article 83 of the Peace Treaty.

" It was maintained on behalf of the French Government that para. 18 could not derogate from para. 1, since it does no more than provide for the conclusion of an agreement and contains no rule of devolution. The agreement referred to in para. 18 is not optional for the Governments concerned; as has just been explained, the latter were under an international obligation to enter into it and, if accord was found to be impossible, to seek out together a procedure capable of replacing it. On the other hand, if para. 18 does not establish an actual apportionment, because it is manifestly impossible for it to do so, it gives, as is shown below, sufficiently precise criteria which the apportionment ought to follow.

" Again, it is objected on behalf of the French Government that, after the coming into force of the Treaty and until the agreement provided for by para. 18 or, in default thereof, the international award, the *biens communaux* situated in a territory ceded under the Treaty could not remain ownerless and the owner could be only the Successor State itself under para. 1. Even if one were to exclude the possibility that the destiny of certain property might remain in suspense during a certain interval, it would none the less be the case that the transfer to the Successor State would have taken place subject to retrocession as the result of the apportionment provided for in para. 18.

" VII. [*Bilateral Nature of Apportionments under the Treaty.*]—When the condition imposed by para. 18 is fulfilled, the *biens communaux* are not transferred to the Successor State (if they are within ceded territory); they must be partitioned. A partition presupposes two or more interested parties. The claimants in this instance can only be local authorities, *viz.*, on one side, an Italian commune part of whose area has passed to France, or an Italian commune to which has been attached the part remaining in Italy of a former Italian commune which has become French; on the other side, a French commune to which has accrued the part which has passed to France of an Italian commune, or a French commune which has succeeded an Italian commune, one part of the area of the latter having remained in Italy. Needless to say, more than one commune of the Successor State might be concerned in a given case; but that does not occur on the Franco-Italian frontier and it can therefore be neglected.

"VIII. [*Subordination by Treaty of Municipal Law Considerations to Nature and Use of Property to be Apportioned. The Maintenance of "Necessary Communal Services"*.]—The *biens communaux* to which para. 18 relates comprise all the property of the commune, save only archives and documents. The Treaty of Peace makes no distinction between, for example, the public and the private domain as it may exist in the law either of Italy or of the State to which the territory is ceded. But the nature and the economic utilization of the property are to be taken into account on a partition. The latter indeed must be, in the first place, just and equitable. The Peace Treaty does not always stop at this reference to justice and to equity; it gives a more precise criterion for a whole category of *biens communaux* and for that category which is generally the most important.

"There is no need to consider whether para. 18 provides for two kinds of agreement (with or without the possibility of combining one kind with another), one kind apportioning the property of the local authorities mentioned, the other ensuring 'a continuance to the inhabitants of necessary communal services not specifically covered in other parts of the Treaty'. Even if it were so, the criterion of the maintenance of communal services necessary to the inhabitants ought *a fortiori* to play a determining rôle, when those services—as will generally be the case—are assured by property which belongs to the commune and which it is necessary to apportion. The apportionment of such property ought to be effected according to the principle of utility, such a principle having appeared, on this hypothesis, to the draftsmen of the Treaty as that conforming most to justice and equity. In para. 18, exception is made only for communal services (and *biens communaux* connected with such services) which are specifically covered in other parts of the Treaty. This restriction is linked, for example, with the archives to which reference is made in para. 1; as has been shown, it plays no part in the present arbitration and it will not be mentioned again. An important consequence flows from the principle stated. With regard to property connected with communal services necessary to the inhabitants it must be shown, before there is any question of apportionment, that there is on both sides of the frontier some interest in the maintenance of such services. There are communal public services for which interest in the apportionment of property connected therewith presupposes the existence in that part of the area which has passed to the Successor State, or remained in Italy, of a part of the population—a group of human beings, an agglomeration of inhabitants. Paragraph 18 of Annex XIV emphasizes ' the inhabitants ' to whom the communal services, the maintenance of which the Peace Treaty seeks to assure, are necessary; and that can only mean the inhabitants of the divided commune, because the inhabitants of the French or Italian commune whose area, after the annexation, has been increased, enjoy and will continue to enjoy the communal services of the French or Italian commune.

" IX. [*The Nature of ' Necessary Communal Services '.*]—What must be understood by communal services necessary to the inhabitants, in the sense of para. 18 of Annex XIV of the Treaty of Peace? On the part of the French Government, it is recognized that this conception of communal services should here be given an extended meaning. It relates, so it is said, to small mountain communes most often lacking public services of a kind which are provided in towns, but for which the possession of a pasture, a forest, a right of grazing or of cutting firewood constitute, generally, essential requirements, and which are of public interest. As a logical consequence, it is recognized on the part of the French Government that the apportionment, in the sense of para. 18 of Annex XIV, ought to extend, if necessary, to a collection of property which, by its use, its nature or its situation governs the life of the locality.

" These considerations, dictated by an exact knowledge of the conditions of life in the region which was affected by the recent modifications of the Franco-Italian frontier, should be completed by the observation that what here qualifies a service as public is the connection between the possession by the commune of the property in question, and the satisfaction, as a result of that possession, of the economic, social or family needs of the inhabitants. The way in which the property is used is unimportant; as is the question whether the connection in question is more or less direct. As regards, for example, pasturages, the commune can open them to the cattle of all the inhabitants free or against payment of a charge, or it can let them to shepherds, on condition that the latter take a lease of the live stock of the inhabitants; or the commune can let them without imposing any such conditions while using the rent to meet the other needs of the commune (schools, highways, religious and medical services, etc.). As regards forests, the commune can permit the inhabitants, within certain limits, to stock up with wood for carpentry or for fuel; it can also sell the right to fell timber and can use the money received therefrom to ensure other indispensable public services.

"X. [*The Necessity for Uniformity in the Application of the Treaty.*]—It results from the very nature of apportionment that the latter must be carried out within the framework of each former commune, taking into account only its property and its agglomeration of inhabitants. The status of the property of a local community into which a given part of the divided commune has been incorporated, is unimportant. Paragraph 18 cannot admit of two different applications, according to whether the village or the hamlet was formed into an autonomous commune or incorporated into another commune; the unilateral decision on this point of one of the States can have no influence on the interpretation of the Treaty of Peace. The village or hamlet detached from the former Italian commune which has passed to France cannot therefore be forced to have recourse for the continuance to its inhabitants of necessary communal services, to the funds of the Italian commune of which it formed part or to those of the Italian State.

"XI. [*Respect for Acquired Rights.*]—It was argued on behalf of the French Government that, according as the Commission decided to allocate to Italian communes either pasturages or woods in French territory, such allocations should be made on the basis of use, to the exclusion of beneficial ownership, and with a clear intimation that a given right of user is charged with the maintenance, for the future, of the economic needs which it is intended to satisfy.

"The rôle of the Commission is, by virtue of para. 18 of Annex XIV of the Treaty of Peace, of the Agreement of Santa Margharita of February 1951 and of the Exchange of Notes of September 27, 1951, to proceed to the apportionment of property of certain local authorities. One can apportion only that which exists, but one must apportion everything that exists. Apportionment cannot legitimately modify the nature of existing rights. It is in any event well understood that those rights will be exercised henceforth, should occasion arise, within the French instead of the Italian internal juridical framework, or vice versa. Property which belonged, by right of ownership, to Italian communes ought normally, if it returns to them on the apportionment, to be allocated to them as owners, even if it is to remain on French territory. In the same way, property on Italian territory returning to communes which were formerly Italian and are now French, ought to remain in their ownership, if the commune held it by right of ownership before the coming into force of the Peace Treaty. To charge the rights of ownership of a commune with the maintenance of certain economic needs would in fact amount to transforming those rights into a servitude, and apportionment alone cannot justify such a transformation.

"There remains the exceptional case where, as a result of exceptional circumstances, a partition of the right of ownership would be the best way of arriving at an apportionment conforming to the spirit of para. 18 of Annex XIV and of the understanding between the two Governments dated September 27, 1951.

" XII. [*The Powers of the Commission. Equitable Principles and the Rules of Good Faith.*]—Although para. 18 prescribes that the apportionment should be just and equitable, the Exchange of Notes of September 27, 1951, between the two interested Governments stipulates that the Commission shall have full power to resolve, even on equitable principles, questions which will be put to it, and taking into account the interests of local populations.

" In order to interpret this passage, it must be borne in mind that para. 18 of Annex XIV refers the question of apportionment to an agreement freely negotiated. It is to be expected that, in the course of the negotiations and in conformity with the rules of good faith, the Governments interested should have agreed to avoid such determinate consequences of the principles admitted as might be susceptible in practice of causing the party on whom they operate inconveniences out of proportion to the advantages which they would have brought to the party profiting from them. And as an award has to replace the agreement, the two Governments wished the Commission to arrive, in such cases, at the same result.

" XIII. [*The Question of Compensating Adjustments on Apportionment. Exclusion of Remedies Not Stipulated in the Treaty.*]—According to the French Government, once an apportionment has been carried out under para. 18, an apportionment or adjustment account will have to be drawn up. . . . [The argument runs thus:] ' It will be right to place to the " credit " of France or of French communes those *biens communaux* situated in French territory which, as has been shown, are now French property. Similarly with the few items belonging to those rare Italian communities which were transferred with their administrative centre and a large part of their population and which, despite the change of nationality, have retained their entity. On the other hand, there should be placed to the " credit " of Italy the *biens communaux* situated in Italian territory which, on September 15, 1947, belonged to a commune which has remained Italian since that date because only a fraction of its territory, but not its *chef-lieu*, has passed to France. The balance of such an adjustment, whether it is arrived at in kind or in a money payment between the two countries, will then depend on an assessment of the needs of the respective local populations, so that the Italian communes will have handed back to them property situated in French territory, and to the extent that the needs of the French inhabitants can or cannot be met by the allocation, in return, of property situate in Italy; or the Italian communes may prefer to receive compensation.'

" The basis of such an adjustment account is said to lie in the connection seen between para. 1 and para. 18 of Annex XIV; the apportionment provided for by para. 18 cannot, it is urged, derogate from the principle of the French right of ownership of those *biens communaux* which have been in French territory since September 15, 1947, and a gratuitous transfer of ownership after that date cannot be presumed. It has already been shown that, in reality, para. 18 applies, instead of para. 1, to the property mentioned therein and that the latter cannot therefore be submitted to two successive [changes of ownership]. The adjustment account proposed on behalf of the French Government thus appears to have neither justification nor juridical basis. If an Italian commune retains the ownership of one of its *biens communaux* which has passed to France, its title thereto derives from para. 18, so far as that paragraph limits the scope of para. 1 of Annex XIV. There can therefore be no question of gratuitous retrocession. It is, moreover, quite clear that para. 18, which (as is admitted on behalf of the French Government) is intended to avoid for communes which are divided by the new frontier certain inequitable consequences of the principle laid down by para. 1, would no longer attain its object if those communes which received under para. 18 property which was thenceforth situated on the other side of the new frontier but which was indispensable to the life of the commune, had to pay for it in full, or if the Italian State had to intervene and pay for it on their behalf.

" It therefore appears probable that, if the draftsmen of the Treaty had intended that there should be such an adjustment on apportionment, they would not have failed to provide for one in para. 18 and, in particular, to include in that provision the principles on which it was to be based. Should there be a global accounting between States? or accounting between communes, within the framework of the several former communities severed by the new frontier? In the argument on behalf of the French Government itself, that question is left open; mention is made of crediting ' France or French communes ', and of crediting France alone or Italy alone. The principles which it is sought to apply to the accounting appear, moreover, neither so clear nor so evident that the draftsmen of the Annex could have avoided particularizing them."

[XIV. *Retroactive Effect of Award.*]—The Commission then proceeded to apply para. 18 of Annex XIV to the various frontier communes in accordance with the interpretation arrived at. The apportionment was made retroactive to the date of the coming into force of the Treaty of Peace. Rents and all other income received in the intervening period were to be handed back to the commune to which the property had been assigned. Any agreements entered into covering all or part of that period were to remain unaffected unless they were capable of determination on an account stated at the date of the apportionment.

[Report: *Recueil des Décisions*, Part IV, p. 213.]

To the report of this Award is appended the following:

" The French Republic therefore orders and commands all bailiffs, and they are hereby required, to put the said Award into execution; all *procureurs généraux* and *procureurs de la République* to ensure compliance therewith; and all commanding officers and officers of police to be of assistance when lawfully called upon.

" In faith whereof [etc.]."

State Succession—Succession to Rights—Assets in the Form of Debts—Division of City of Berlin into East Berlin and West Berlin—Debt Owing to Bank Operated by City—Branches of Bank Situate in East Berlin and West Berlin—Debt Owing to Branch in East Berlin—Whether Head Office of Bank in West Berlin Entitled to Payment of Debt.

BANK OF CITY OF BERLIN CASE.

German Federal Republic, Federal Supreme Court. March 17, 1953.

THE FACTS.—The City of Berlin, prior to the political division of the City into two separate parts, *viz.*, East Berlin and West Berlin, operated a savings bank, with numerous branches in all parts of the city. The account of the defendants (who were resident in West Berlin) with one of the branches of the Bank situate in East Berlin was overdrawn when the division of the City occurred. The Bank, whose head office was in West Berlin, now brought an action against the defendants for the amount owing to the branch in East Berlin. It was contended on behalf of the plaintiffs that as the branch in East Berlin did not enjoy independent legal status they, the plaintiffs, were entitled to the payment of the defendants' debt. On behalf of the defendants it was contended that, as a result of the division of Berlin into two separate parts, the claim of the Bank was not vested in the branch in East Berlin which alone, and to the exclusion of the plaintiffs, was entitled to claim payment, and that the plaintiffs' action should accordingly be dismissed *in limine.*

Held: (i) that the question as to whether this was a case of State succession need not be determined; (ii) that even in the case of State succession only those assets of the predecessor State vest in the successor State which have previously been used by the predecessor State in connection with the exercise of the latter's sovereign functions, but not those previously used for the purposes of commercial State enterprises; (iii) that, accordingly, the claim was still vested in the plaintiffs, but that the latter were not entitled to succeed because a judgment in their favour would expose the defendants to the danger of having to meet a subsequent claim by the branch in East Berlin. A judgment in the plaintiffs' favour would therefore be contrary to the principle of good faith.

The Court said: " The question as to the legal effect on this claim of the severance of the administration of East Berlin from the remaining administration of the City cannot be simply determined in accordance with the rules of international law which have been developed with regard to the limits of the effectiveness of sovereign acts, such as requisitions and confiscations, because in the present case there has been no specific act of confiscation resulting in the expropriation of the assets of the Bank in the eastern sector. The transfer of the administration of the eastern branches of the Bank to the authorities of the eastern sector was simply the result of the political severance of the whole administration of the eastern sector. The domicile of the debtor is not relevant to the question whether the claim belongs territorially to the western or eastern branches of the Bank. The most obvious nexus is provided by the locality in which the account is kept, which is also the *locus solutionis* for both parties, in accordance with banking custom. That locality is the branch of the Bank in the eastern sector. This, however, does not provide a solution to the problem of the legal classification of this claim. In the absence of any agreement between the Berlin City Council and the authorities of the eastern sector, the claim here in issue would not have vested automatically in the eastern authorities even if this were a case of State succession as understood in international law. Writers on international law agree that while in cases of this kind such assets of the State as are earmarked for the sovereign functions of the State (" public assets ") automatically vest in the successor State, the same rule does not apply to commercial assets, such as, in particular, those assets which belong to commercial State enterprises; and that in the case of the latter there must be a specific agreement dealing with the problem. It follows that there is no legal basis for a transfer of the assets of the Berlin City Bank to the successor organization in the eastern sector of Berlin. Accordingly, the claim is vested in the plaintiffs."

The Court then proceeded to deal with the principle of good faith referred to above, and reached the conclusion that it would be contrary to good faith to allow the plaintiffs' case to succeed, there being a danger that the defendants' assets in the eastern sector of Berlin might be seized in satisfaction of a judgment obtained against the defendants at the suit of the branch of the plaintiffs' Bank in the eastern sector. The action was accordingly dismissed.

[Report: NJW, 6 (1953), p. 861.]

State Succession—Succession to Rights—Fiscal Funds.

See p. 145 (*Gudder Singh and Another* v. *The State*).

IV.—Succession with regard to Obligations for Delinquencies (Torts)

State Succession—With regard to Obligations for Torts—Re-Organization of German "Länder"—Wrongful Act by Official of One "Land" Merged in Another—Whether Latter "Land" Liable—Meaning of Term "Functional Succession"—The Law of Germany.

Functional Succession Case.

German Federal Republic, Federal Supreme Court. July 9, 1953.

The Facts.—The plaintiff was the owner of a motor car which was requisitioned in June 1945 by order of the highest executive official of one of the German *Länder*. The order was subsequently declared by the competent administrative tribunal to be invalid, with the result that the requisition became invalid *ab initio* and gave rise to a claim for damages, at the suit of the plaintiff, against the *Land* concerned. Meanwhile, however, a partial administrative re-organization of the German *Länder* had taken place, and the *Land* which would normally have been liable had become part of another *Land*. The plaintiff now instituted proceedings against the latter, his contention being that it was liable for wrongful acts committed by officials of its predecessor in title. On behalf of the defendant *Land* it was contended that the action should be dismissed *in limine*, as having been brought against an entity which was not in existence when the wrongful act was committed.

Held: that this was a case of so-called functional succession, and that the action had been rightly brought against the defendant *Land*.

The Court said: " This Court has previously taken the view that the assumption of functions of the Reich necessarily implies the taking over of liabilities originating in the performance of the sovereign tasks of the entity which formerly possessed sovereign power. The same principle must be applied in the present case, where the official concerned exercised at the material time the sovereign functions of the State which now devolve upon the defendant *Land*. In determining this question we cannot treat as relevant the continuity of the outward legal form. What is decisive, for the sake of an equitable balance of interests and the maintenance of the legal order, is the continuity of the substance, *viz*., the functions, organization and assets. In view of the fact that each branch of the administration is, as a matter of principle, based on a function formerly exercised, the subsequent administration cannot be divorced from such function, either in fact or in law. This consideration applies, generally speaking, also to the period following the occupation of Germany in 1945, and in particular so far as concerns the sphere of activity of the newly established defendant *Land*. The latter has treated as binding the administrative acts carried out by officials formerly serving the predecessor *Land*. It has claimed all the revenue raised by these officials and, conversely, it has met all administrative liabilities. In any event, factually the administrative activities of these officials have not undergone any change as a result of the formal establishment of the defendant *Land*. We are thus concerned with a case of functional succession, the effect of which is that the (defendant) *Land* is responsible for liabilities arising from the acts carried out by officials in the territory which it subsequently formally took over."

[Report: NJW, 6 (1953), p. 1667.]

State Succession—With regard to Obligations for Torts—Holland and Indonesia.

VAN DER HAVE *v.* STATE OF THE NETHERLANDS.

Holland, District Court of The Hague. January 12, 1953.

THE FACTS.—On December 21, 1948, Dr. Nasoetion, the husband of the plaintiff, was killed by a soldier of the Royal Netherlands Indies Army who was on duty during the so-called second military action on Java. It was admitted that the killing of Dr. Nasoetion was unlawful. The plaintiff sought to recover compensation for the loss she had suffered by the death of her husband. The State of the Netherlands disclaimed liability on the following grounds: The State of the Netherlands was only the European part of the Kingdom of the Netherlands. The military forces which operated during the second military action on Java, whether they belonged to the Royal Netherlands Indies Army or to the Netherlands Army, were not in the service of the State of the Netherlands but in the service of that part of the Kingdom which was called Indonesia. Liability for torts committed by soldiers of one of these armies, it was contended, rested upon Indonesia. According to Article 4 of the Agreement on Transitional Measures between the Kingdom of the Netherlands and the Republic of the United States of Indonesia, liabilities of that part of the Kingdom which was called Indonesia were transferred to the Republic of Indonesia.

Held: that the Republic of Indonesia, as successor to the former Indonesia which was part of the Kingdom of the Netherlands, must be held responsible *vis-à-vis* the plaintiff.

The Court said: "The plaintiff contends that the costs of the military action are not born by the Republic Indonesia. This circumstance, however, is irrelevant in this case as it merely concerns the relations between the two States and not the rights of third persons." However, the Court also held that although the Republic of Indonesia, as successor to the former Indonesia which was part of the Kingdom of the Netherlands, must be held responsible *vis-à-vis* the plaintiff, this did not exclude the possible responsibility also of the State of the Netherlands.

[Report: *N.J.*, 1953, No. 133.]

NOTE.—The Court dealt at length with the question why, having regard to the provisions of the constitutional law of the former Netherlands Indies, the State of the Netherlands should compensate the plaintiff. The Court held that the State of the Netherlands was bound to do so. From the point of view of international law the judgment seems to depart drastically from the accepted practice in respect of the liability of the successor State for torts.

V.—Respect for Private Rights

State Succession—Effect on Private Rights—Currency of Successor State—Transfer of Sovereignty from Dutch East Indies to Indonesia.

HEINEMANN *v.* SENEMBAH COMPANY.

Holland, District Court of Amsterdam. November 14, 1950.

Court of Appeal of Amsterdam. December 5, 1951.

Supreme Court. February 13, 1953.

THE FACTS.—In 1926 the plaintiff, who was employed by the defendant Company on their plantations in Indonesia, entered into a contract with the Company pursuant to which part of his savings were to be left with the Company in the Netherlands Indies. The contract was silent as to the place where, or the currency in which, the savings were eventually to be repaid. When the time came for such repayment, the defendant Company were willing to pay the amount due, but only in Indonesia and in Indonesian rupiahs. The plaintiff sued for payment in Holland and in Netherlands guilders.

Held (by the District Court): that the action must succeed and payment must be made as claimed by the plaintiff. The nature of the relationship between Senembah (a company incorporated in the Netherlands) and its former employee gave the latter the choice of claiming payment of his deposit account either in Indonesia in Indonesian currency or in Holland in Dutch currency. Moreover, the Indonesian Ordinance of 1945 relative to the freezing of debts, on which the defendant Company had relied, had only territorial effect.

The defendant Company appealed.

Held (by the Court of Appeal): that the appeal must succeed. Netherlands Indies (now Indonesian) law applied to the contract; the Netherlands Indies guilder had been replaced by the Indonesian rupiah; the claimant could only claim payment in this new currency;

and, in any event, the defendant Company could not be ordered to pay the balance due in Netherlands guilders since the two currencies were not freely interchangeable.

On further appeal, the Supreme Court refused, on procedural grounds, to interfere with the judgment of the Court of Appeal.

[Reports: *N.J.*, 1952, No. 283; *ibid.*, 1953, No. 480.]

NOTE.—For a case in which a similar point of law was resolved in a contrary sense see *Van Maren* v. *Eerste Nederlandse Verzekering Maatschappij* (*International Law Reports*, 1954).

VII.—International Conventions

State Succession—Treaties—Extradition Treaties.

See p. 363 (*N.* v. *Public Prosecutor of the Canton of Aargau*).

State Succession—Treaties—India.

See p. 41 (*Dabrai* v. *Air-India Limited*).

IX.—Continuity of the Law. Judgments of Courts. Pending Actions

State Succession—Laws Enacted by Predecessor State—Continuing Force After Creation of New State—Extent to which Netherlands Law Remained Applicable to Republic of Indonesia—Succession of Indonesia to Rights and Powers of The Netherlands.

NAAMLOZE VENNOOTSCHAP SUIKERFABRIEK "WONO-ASEH" *v.* CHASE NATIONAL BANK OF CITY OF NEW YORK *ET AL.*

United States, District Court, Southern District, New York.
April 8, 1953.

THE FACTS.—The plaintiff corporation had been organized under the laws of the Netherlands East Indies. It had four shareholders, one of whom was the managing director, von Freyburg. In 1939 von Freyburg opened a custody account with the Chase National Bank in the name of the plaintiff and deposited therein the securities of American companies owned by the plaintiff. On May 21, 1940, shortly after the occupation of the Netherlands by the German Armed Forces, the Governor-General of the Netherlands Indies promulgated the Foreign Exchange Ordinance, 1940, which empowered the Governor-General to promulgate regulations concerning the recording, delivery, and utilization of, *inter alia*, domestic and foreign securities held by residents of the Netherlands East Indies. On May 25, 1940, the Governor-General issued a decree which required all persons in the Netherlands Indies to place securities held abroad in the custody of one of four named banking institutions, one of which was Escomptobank, N.V. A similar decree of July 4, 1940, replaced that of May 25, 1940, but added that the Foreign Exchange Institute, charged with the control of foreign exchange, was to " fix the point of time after which any securities delivered . . . . in accordance with subsection 1 may be restored to the persons entitled thereto upon their request." Pursuant to these decrees, von Freyburg issued instructions to the Chase National Bank and Escomptobank directing that the custody account of the plaintiff be transferred to Escomptobank. The plaintiff's account with the Chase National Bank was accordingly closed and a custodian agreement executed between the Chase Bank and Escomptobank. Early in 1942, the account of Escomptobank was transferred to the Netherlands Purchasing Commission, an agency of the Netherlands Government-in-Exile, in order to prevent these assets from falling into the hands of the Japanese, whose invasion of the Netherlands Indies was imminent. In 1947, the securities were transferred back to Escomptobank.

Subsequent to the initiation of this litigation, the plaintiff, purporting to act under a Netherlands Law of April 26, 1940, attempted to transfer its corporate seat to Surinam (Dutch Guiana), and was recognized as a Surinam corporation by its Governor-General. In June 1950, the plaintiff sought the release of the securities at the Chase Bank, and in June and December 1950, at the plaintiff's request, Escomptobank applied for a licence from the Foreign Exchange Institute of the Republic of Indonesia to deliver the securities to the plaintiff. The request was refused. Escomptobank had in the meantime continued to credit the account of the plaintiff in Indonesia with income received from the securities, but Indonesian foreign exchange regulations precluded the removal of any of the funds from that country.

The plaintiff brought this action to recover the securities, which were valued at $950,000, and a cash balance of $108,000. Escomptobank was impleaded as a defendant. The Foreign Exchange Institute of Indonesia intervened in support of Escomptobank, and the Foreign Exchange Commission of Surinam claimed the right to possession of the securities by virtue of the foreign exchange enactments of Surinam.

Held: that judgment must be given for the defendant Escomptobank, and the defendant Chase Bank must be directed to hold the securities and cash balance to the order of the Escomptobank, which would continue to exercise control over the account in the same manner as theretofore. Extraterritorial effect would not be given to the foreign exchange laws of the Netherlands Indies, but such laws could be looked to as evidence of the plaintiff's intention. The effect of the transfer of the securities by the plaintiff in compliance with such laws was the loss of control and possession of the securities. The

Dutch Law of April 26, 1940, governing the transfer of corporate seats from one part of the Netherlands to another, was inconsistent with the sovereignty of Indonesia and did not remain in effect after that Republic became independent. It accordingly gave the plaintiff corporation no power to effect a *de jure* transfer of its corporate seat without the consent of the Indonesian Government. The transfer of the account to the Netherlands Purchasing Commission in 1942 was a valid conservatory measure. The rights and powers to control foreign exchange formerly exercised by the Netherlands continued in force upon the coming into being of the Republic of Indonesia, since they were not inconsistent with the transfer of sovereignty.

The Court said, with regard to the issues of international law presented by this case: "It is the contention of the plaintiff that the removal of the corporation and its stockholders from Indonesia and the transfer of the corporate seat to Suriname deprived the Indonesian Government of any interest it might have had in or any control over the securities.

"On April 26, 1940, the Dutch Government acting, as stated in the preamble of the statute, because of the then existing extraordinary circumstances, promulgated a law (Plaintiff's Exhibit 12) designed to facilitate transfer of corporate seats from one part of the Netherlands to another. This was another measure designed to prevent assets in areas overriden by an enemy from being taken from their Dutch owners. It was ostensibly pursuant to the authority of this statute that the Governor General of Suriname acted in recognizing the plaintiff as being a Suriname corporation. On the validity of this transfer of corporate seat also rests the claim of the Foreign Exchange Institute of Suriname which, asserting that plaintiff is subject to Suriname law, including that country's currency regulations, asserts that it has the right to possession of these securities. To so hold, would, of course, accord extraterritorial effect to the Suriname currency regulations, but the resolution of other issues in this case makes it unnecessary to decide the incongruous contention that such extraterritorial effect might be given to the Suriname but not to the Indonesian currency regulations.

"As an expert witness on the effect of the attempted transfer of corporate domicile to Suriname plaintiff called Mr. Hans Smit. Although he concluded that the transfer to Suriname was valid, he acknowledged that the April 26, 1940, Law was designed to allow transfer from one part of the Netherlands to another part of the Netherlands and that at the time of the attempted removal to Suriname, the Republic of Indonesia was not a part of the Netherlands. Plaintiff urges, however, that the corporate transfer law not having been revoked in Indonesia by the new sovereign, the private laws of that country remain in effect until repealed. *Vilas* v. *City of Manila*, 1911, 220 U.S. 345, 31 S.Ct. 416, 55 L.Ed.

491. However, by virtue of an agreement between the Netherlands Government and Indonesia, it is agreed that Netherlands law remains applicable in Indonesia only to the extent that it is not inconsistent or incompatible with the transfer of sovereignty to Indonesia. *Transitional Regulations*, Section 8. It is the conclusion of this Court that the April 26, 1940, corporate transfer law is inconsistent with the sovereignty of Indonesia, and nothing bolsters that conclusion more than the facts in the instant case.

" Plaintiff's corporate existence and powers are governed by the law of the country of its incorporation. *Restatement, Conflict of Laws*, Section 157, 158, 159. Before the purported change of corporate seat in 1950, the plaintiff corporation was subject to the jurisdiction of the Republic of Indonesia and by means of currency regulations designed, not for plaintiff's benefit but to sustain the foreign exchange position of the Government, control was being exercised over the assets of plaintiff in New York. In August 1950[1] (after the commencement of this litigation), in which the interest of the Republic of Indonesia, represented by its agent, the Foreign Exchange Institute of Indonesia, became quite apparent, plaintiff endeavored to remove itself entirely from the jurisdiction of Indonesia by the purported transfer of corporate domicile; this without the consent of the Indonesian Government, which has not to the present time recognized the supposed transfer of seat to Suriname. Were the Law of April 26, 1940, construed as permitting this, it would be effective in depriving the Republic of Indonesia, without its consent, of control it had already exercised over assets and the continuation of which it apparently deems necessary to the welfare of its national economy. Certainly to this extent, therefore, the use which plaintiff seeks to make of the April 1940 Law is indeed inconsistent with the sovereignty of the Republic of Indonesia. I conclude, therefore, that the April 26, 1940, Netherlands Law did not continue in force in Indonesia after that country became a sovereign nation, in August 1949.

" Assuming the April 26, 1940, Act were otherwise applicable, there would be other reasons for declaring it unavailable to plaintiff as authority for the purported transfer of seat. Its preamble states it was to be effective only under the then existing extraordinary circumstances. As Professor Kisch and Dr. von Saher, another expert on Dutch and Netherlands Indies law, testified, the then contemplated circumstances were ' war circumstances ', i. e. the war with Germany and the then imminent war with Japan, and not those presented by the state of affairs in Indonesia in August of 1950, when the attempted transfer of corporate seat took place.

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[1] Plaintiff's witness, Hans Smit, testified that the expiration of the corporate charter in 1949 has no bearing on this problem since under Dutch law the corporate manager may continue to act after that expiration in furtherance of the liquidation of the corporation.

I am, therefore, of the opinion that the statute urged upon this Court was inapplicable to the plaintiff corporation and gave to it no power to effect a de jure transfer of corporate seat, without the consent of the Indonesian Government.

" In support of its contention that plaintiff is now a Suriname corporation and that this cannot be questioned plaintiff urges that the approval by the Governor of Suriname of the amendment to the certificate of incorporation by which the transfer was to be effected was an administrative act of an official of a foreign government which should be accorded recognition by the courts of the forum. *Oetjen* v. *Central Leather Co.*, 1915, 246 U.S. 297, 38 S.Ct. 309, 62 L.Ed. 726; *Banco de Espana* v. *Federal Reserve Bank*, 2 Cir., 1940, 114 F.2d 438.[1] But while this proposition will support the contention that plaintiff is a Suriname corporation for some purposes—as for instance to establish its capacity as a Suriname corporation to maintain this action, Cf. *Chemacid S. A.* v. *Ferrotar Corp.*, D.C.S.D.N.Y.1943, 51 F.Supp. 756, 759,[2] it does not follow that for all purposes would its present corporate domicile in Suriname govern the ruling of the forum. Mr. Smit, Dr. von Saher and Professor Kisch have all testified that such a transfer of seat or loss of corporate existence in Indonesia could have no effect on conveyances already completed. The transfer of seat could not undo that which has been done. I have previously found that the June 13, 1940, letter and subsequent letters served to transfer an interest and control over the securities to the Netherlands Indies Government, succeeded by the Indonesian Government, acting through its agent, the Escomptobank. No unilateral act by the plaintiff of the sort here in question can serve to invalidate that transfer. An individual or a corporation may remove itself or even be banished from a country but that removal will not nullify acts already completed prior to such removal.

" Plaintiff has also urged that the transfer of the account to the Netherlands Purchasing Commission in 1942 was an unauthorized act which terminated the bailment to the Escomptobank and restored to plaintiff the right to immediate possession. These transfers bore a merely formal character and were designed to protect the *res* from enemy control.[3] The Netherlands Purchasing Commission acted as a trustee and in October 1947 did in fact return the securities intact to their former status. Assuming it was unauthorized, it is difficult to see how plaintiff has been injured by this transfer. Indeed this transfer was for the benefit of plaintiff and the protection of its property. Furthermore, the transfer in 1942 and the re-transfer in 1947 were fully authorized under the laws of the Netherlands Indies and were, moreover, perfected after consultation by Dutch Government officials with officials of our own Government.

[[1] *See Annual Digest*, 1938–1940, Case No. 6.]
[[2] *Ibid.*, 1943–1945, Case No. 125.]
[3] The Japanese invasion was imminent.

It is not for this Court to inquire into the legality of acts taken by the Netherlands Indies Government for the protection of its citizens. Cf. *Bernstein* v. *Van Heyghen Freres S. A.*, 2 Cir., 1947, 163 F.2d 246, 249, certiorari denied 1947, 332 U.S. 772, 68 S.Ct. 88, 92 L.Ed. 357.[1]

" Of course, where the bailee effects a transfer which is repugnant to or may be said to be an absolute disclaimer of the original bailment, such bailment terminates and the right to immediate possession is restored to the bailor. But the interests created by the letter of June 13, 1940, were not those of a bailment in which the sole interest remained with the bailor. This was not the usual bailor-bailee relationship. While there is no denial of the proposition that plaintiff has at all times remained the beneficial owner of these securities, such ownership became encumbered by an interest created first in the Netherlands Indies Government and then in the Indonesian Government as a result of plaintiff's act appointing Escomptobank in compliance with the decrees and ordinances. Were it not for this interest the bailment might, indeed, be terminable at the will of the bailor under both Dutch and New York law. See Netherlands Indies Civil Code, Section 1725; Williston on Contracts, Section 1039. But the very purpose for which the foreign exchange ordinances were passed was to create such an interest in the Netherlands Indies Government. There has been expert testimony to the effect that unlike the Decrees A-1 or its Netherlands Indies counterpart C-18, the foreign exchange ordinances were not enacted for the benefit or protection of the Dutch property owner but rather were designed to protect the national economy. Compare *State of the Netherlands* v. *Federal Reserve Bank of New York and Archimedes*, 2 Cir., 201 F.2d 455. It was for this reason that under the ordinance and decrees a great degree of control over securities transferred was given to the Foreign Exchange Institute, and surely this control included the power to transfer the account to an agency of the Netherlands Government where such transfer was for the purpose of keeping the securities from falling into the hands of the enemy.

" It has been urged that this Court consider the manner in which the foreign exchange ordinances are being administered by the new sovereign. There is also submitted for my consideration the averment that the coming into being of such a new sovereign ipso facto has the consequence of making the transfer revocable.

" The agreement between the Kingdom of the Netherlands and the Republic of Indonesia which recognized the sovereignty of the latter, provided for the continuation in Indonesia of Dutch law to the extent that such law was not inconsistent with the transfer of sovereignty. It is significant that all of the various foreign exchange

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[[1] See *Annual Digest*, 1947, Case No. 5.]

ordinances and decrees which sought to place control over foreign assets in the Government were enacted in 1940 by the predecessor sovereign. The Indonesian Government has chosen to continue them in force and the Foreign Exchange Institute of the Netherlands Indies has now been replaced by the Foreign Exchange Institute of Indonesia.

" Plaintiff contends that under Indonesian rule there exists a policy of discrimination against Dutch nationals and that in furtherance of this policy the foreign exhange ordinances are being administered in such a manner as to be confiscatory. Plaintiff emphasizes that neither the corporation nor any of its stockholders have recognized the sovereignty of the Republic of Indonesia and urges that there is, therefore, no power in that sovereign to exercise control over property in New York of former residents. Cf. *United States ex rel. Schwarzkopf* v. *Uhl*, 2 Cir., 1943, 137 F.2d 898[1] (individuals fleeing invader may elect new nationality or remain stateless).

" It is significant to note that plaintiff does not contend that these very same foreign exchange ordinances and decrees, when enacted, or as administered by the Netherlands Indies Government were discriminatory or confiscatory. (It is agreed by all parties that they were to have no extraterritorial effect and so this Court is not called upon to determine whether even as administered by the Dutch they fall into that category of foreign statute to which the forum would deny extraterritoriality.)

" The sovereignty of the Republic of Indonesia has been recognized by the Kingdom of the Netherlands and the status of that new country with respect to Dutch residents and to the continuation of Dutch laws is affected by the terms of the agreement recognizing such sovereignty. The attention of this Court has not been directed to any provision in such agreement which would serve to deprive the Indonesian Government [of] any power exercised by the former sovereign with respect to the matters here in question. Under that agreement, as has been noted previously, Dutch law and hence the rights and powers which that law gave to the Government continued in force unless incompatible with the transfer of sovereignty. The sovereignty of Indonesia has been recognized in both the Netherlands and the United States. The control exercised here is not that of the de facto government of an invader. The Republic of Indonesia is a *de jure* government and entitled to the recognition accorded such governments. Contrast *Chemacid S. A.* v. *Ferrotar Corp.*, *supra*.

" Had the Netherlands Indies Government acting under foreign exchange ordinances provided that income received on foreign securities would be credited to the account of the beneficial owner in local currency rather than dollars, it would have been acting within its power. In crediting the account of plaintiff in Indonesia with income from these securities not in dollars, but in Indonesian Rupias, the Republic of Indonesia is acting in a similar manner. Control of the national currency and of foreign exchange is a necessary attribute of sovereignty.[1] *Ling Su Fan* v. *United States*, 1910, 218 U.S. 302 310, 31 S.Ct. 21, 54 L.Ed. 1049. The obligatory purchase of government bonds with half of plaintiff's account balance in Indonesia is an act of a foreign government done within its own territory having no necessary relation to the foreign exchange control law. Our courts have consistently refused to pass on such acts.

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[1] See *Annual Digest*, 1943–1945, Case No. 54.]

"It is the fundamental premise of this decision that plaintiff by its own act, albeit under the direction of an ordinance and decree, admittedly valid in the Netherlands Indies, conveyed to the Escomptobank, acting as a Government agency, control and possession over these securities. By virtue of an agreement between the Kingdom of the Netherlands and the Republic of Indonesia that control is now being exercised by the latter sovereign.

"An American Court will not recognize a foreign statute which is confiscatory or otherwise against the public policy of the forum as effecting, of its own force, a transfer of property situated in this country. See Seidl-Hohenveldern, Extraterritorial Effects of Confiscations and Expropriations, 49 Michigan L.Rev. 851 (1951). But I know of no authority for the proposition that an interest already conveyed to the sovereign will be restored to the transferor because the sovereign sees fit to exercise the power created by such an interest in a manner which might offend the public policy of the forum."

[Report: 111 F.Supp. 833.]

State Succession—Judgments of Courts—Incorporation of Austria into German Reich—Conviction of Criminal by Court in Austria —Whether such Conviction Equivalent to Conviction Obtained in Germany—Liability to Punishment as Recidivist according to German Law.

RECIDIVISM (GERMANY) CASE.

German Federal Republic, Federal Supreme Court. September 15, 1953.

THE FACTS.—Section 244 of the German Penal Code provides that a person twice previously convicted of larceny "in Germany" ("*im Inland*") is liable to be punished as a recidivist if he is subsequently again convicted of a similar offence. In 1953 the appellant was convicted by a German court on several charges of larceny committed in Germany in 1951 and 1952. He had previously on two occasions (in 1941 and 1943) been convicted of larceny in accordance with Austrian law by an Austrian Court while Austria formed part of the German Reich. The question now arose whether these latter convictions were convictions obtained " in Germany " which would entitle the Court to punish him as a recidivist as provided in Section 244 of the German Penal Code. On behalf of the appellant, it was contended that he could not be so punished, on the ground that the incorporation of Austria into the German Reich was contrary to international law, and that accordingly convictions obtained against him in Austria could not be said to be convictions obtained " in Germany ". On behalf of the prosecution, it was contended that it was immaterial whether the incorporation of Austria was in accordance with international law, and that the only decisive factor was the factual exercise of German jurisdiction by courts in Austria while the latter country formed part of Germany.

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[1] The Court of Appeals for the Second Circuit has recently observed that 'in view of all that has happened in the world, it seems profitless to characterize the currency maneuvers of foreign governments as unconscionable.' *Egyes* v. *Magyar Nemzeti Bank*, 2 Cir., 1948, 165 F.2d 539, 541. In *Hughes Tool Co.* v. *United Artists Corp.*, 1st Dept. 1952, 279 App.Div. 417, 110 N.Y.S.2d 383, 387, it was observed that foreign governments cannot in many cases remove currency restrictions 'except at the expense of national survival.'

Held: that the appellant's contention must be rejected, and that the German Court was entitled to punish him as a recidivist.

The Court said: " The two previous convictions were obtained ' in Germany ' within the meaning of s. 244 of the Penal Code, *viz.*, in the exercise of German jurisdiction. The notice of appeal regards as illegal and void the unification of Austria with the German Reich, which was achieved by the exercise of compulsion. In the present context, however, the nature of this unification as understood by international law is irrelevant, the position being similar in that respect to that arising in connection with the question of nationality; the only relevant factor is the factual situation arising from the annexation and its significance for German municipal law. According to these criteria Austria had become part of the German Reich, and Austrian courts exercised German jurisdiction. The Austrian law applied by these courts continued to apply as part of German law . . . . The previous convictions thus obtained in Germany against the accused cannot be disregarded as prerequisites of recidivism merely because the Austrian Penal Code, in accordance with which they were obtained, contains a wider definition of larceny than the German Penal Code. This consideration is irrelevant because the previous offences committed by the accused also constituted larceny in accordance with s. 242 of the German Penal Code. The further contention of the appellant that he served one of his previous sentences in a prison situate in a locality forming part of Yugoslavia and incorporated into Austria only as a result of the occupation of Yugoslavia, is also irrelevant. All that is relevant is the fact that the sentence was served under German jurisdiction and in accordance with the relevant German legal provisions applicable thereto."

[Report: BGH St, vol. 4, p. 335.]

State Succession—Continuity of the Law—Pending Actions—Partition of States—India and Pakistan—Indian Independence (Rights, Property and Liabilities) Order, 1947—The Law and Constitution of India—Jurisdiction of Indian Courts—Immunities of Foreign Sovereign.

LAKHMI CHAND *v.* PUNJAB STATE.

India, High Court of Punjab (Appellate Civil). August 4, 1953.
(Bhandari C.J. and Khosla J.)

THE FACTS.—This was the second appeal from an order of the Senior Sub-Judge, Jullundur, with enhanced appellate powers, dated 31 May, 1952, affirming that of the Sub-Judge (IVth Class), Jullundur, dated 6 March, 1952, ordering the plaintiff to present his case in the proper court having jurisdiction in the matter. The appellant had been convicted of an offence against a certain ordinance of the then United Punjab, prior to the Partition of India, and goods belonging to him had been confiscated by the Crown as a result. Subsequently, upon appeal, he was acquitted, on August 9, 1947, and he then sought to recover his goods or their value. Meanwhile, on August 15, 1947, the Partition of India took place, and the Punjab was divided between India and Pakistan. The appellant took up residence at Jullundur, in India, but his original cause of action had arisen in that part of the Punjab which had been transferred to Pakistan. On May 7, 1951, the appellant brought an action against the Punjab (India) Government for a sum representing the value of his goods. The Punjab Government raised a preliminary objection that the cause of action lay, if at all, against the Government of Pakistan and not against either that of Punjab (India) or of India, and this was upheld by the trial Court and by the Senior Sub-Judge. A Single Judge took the view that " it is inequitable that although a person displaced from Pakistan may have a perfectly legitimate claim against the Government of this country, he should not be able to enforce the claim because the cause of action had arisen in a part of the country which is now a part of Pakistan ", and he referred the case to a Divisional Bench for decision. Before this Divisional Bench the Government of the Punjab raised the same objection.

Held: that the objection of the Punjab Government must be sustained. In view of the Partition and the fact that the cause of action on which the plaintiff relied had arisen in territory which, since the Partition, had become part of Pakistan, no Indian authority could be liable upon that cause. According to the Indian Independence (Rights, Property and Liabilities) Order, where a cause of action arose in territory which, after the partition of India, had become Pakistani territory (the cause of action being exclusively referable to that location), then the cause of action lay against the

Pakistani Government. The Government of Pakistan had not been impleaded as defendant, and even if it had been and even if a decree had been made against it, the Court would have had no power to enforce the decree against a foreign sovereign. For the purposes of this decision the Court assumed that the Court at Jullundur had jurisdiction to hear and determine the cause, although this was by no means certain.

Bhandari C.J. said: " The short point for decision in the present case is whether the civil courts at Jullundur have jurisdiction to entertain a suit by a displaced person from Pakistan against the Government of Punjab (India) in respect of a cause of action which arose wholly within the territories of Pakistan . . . .

" Assuming for the sake of argument that the Courts in Jullundur had jurisdiction to deal with the case, the question arises whether the plaintiff has a good legal claim against the Punjab Government. When the Indian Independence Act was enacted by the British Parliament on the advice of the principal political parties in India, Parliament conferred power on the Governor-General to make certain Orders, and in exercise of the power so conferred the Governor-General promulgated the Indian Independence (Rights, Property and Liabilities), Order, 1947, for the initial distribution of rights, property and liabilities consequential on the setting up of the Dominions of India and Pakistan. Paragraph 10 of the said Order declares that when immediately before the 15th day of August 1947, the Governor-General in Council is subject to any liability in respect of an actionable wrong other than breach of contract, that liability shall, where the cause of action arose wholly within the territories which, as from the said 15th day of August 1947, are the territories of the Dominion of Pakistan, be a liability of that Dominion. As Government in the present case omitted to restore the goods of the plaintiff in pursuance of the order of the 9th August 1947, the original liability must be deemed to be that of the Governor-General in Council and as the cause of action arose wholly within the limits of the Sheikhupura District, which now forms part of the Dominion of Pakistan, the plaintiff's action can lie only against the Government of Pakistan and not against the Government of India or the Government of the Punjab (India). The Government of Pakistan has not been impleaded as a defendant. Even if it had been impleaded and even if a decree had been passed against it, the decree would have been of no consequence, for the Courts of this country have no power to enforce decrees against Government[s] of foreign countries.

" For these reasons, I would uphold the order of the Court below and dismiss the appeal. . . ."

Khosla J. concurred.

[Report: I.L.R. [1954] VII Punjab 61.]

State Succession—Judicial Proceedings and Judgments of Courts—Re-Emergence of Independent Austrian State after Temporary Incorporation in German Reich—Agreement on Competence of Austrian Courts—Agreement Concluded While Austria Part of Reich—Whether Austrian Court Entitled to Exercise Jurisdiction after Severance of Austria from Reich.

PATERNITY SUIT (AUSTRIA) CASE.

Austria, Supreme Court. April 29, 1953.

THE FACTS.—The parties agreed in July 1944, while Austria formed part of the German Reich, that any proceedings relating to the paternity of the plaintiff's child were to be determined by the " County Court " of Vienna. In 1947, *viz.*, some time after the severance of Austria from Germany and the re-emergence of an independent Austrian State, the plaintiff, alleging that the defendant was the father of her illegitimate child, brought an action for the maintenance of the child in the District Court of Vienna. The defendant disputed the jurisdiction of the District Court of Vienna, on the grounds that he was domiciled in the Federal Republic of Germany and that he would not have made an agreement submitting to the jurisdiction of the " County Court " of Vienna if he had known that at the time of the proceedings that Court would no longer be a German court, and that the agreement was therefore invalid.

Held: that the agreement between the parties remained unaffected by the subsequent change in the legal status of Austria, and that the District Court of Vienna had therefore rightly exercised jurisdiction in the matter.

The Court said: " The agreement of July 19, 1944, remained in force after the constitutional change which occurred in 1945. The business of the former ' County Court ' of Vienna was transferred to the District Court of the City of Vienna, by virtue of the Transitional Law of July 20, 1945, and all cases then pending became subject to the jurisdiction of the latter Court. At that time there were no rules of Austrian or international law which would have precluded the jurisdiction of the Austrian courts over the paternity suit here in issue. The agreement previously concluded went beyond an agreement concerning local competence; it also effectively provided for the jurisdiction of an Austrian court. The fact that the proceedings were served on the defendant after the constitutional change in the status of Austria, namely, on April 13, 1949, does not affect the above reasoning. The Courts below rightly reached the conclusion that the jurisdiction of the Austrian courts is not lacking in the present case."

[Report: SZ, XXVI (1953), p. 307.]

PART III

STATE TERRITORY

A—IN GENERAL

II.—Acquisition of Territorial Sovereignty

State Territory—Acquisition of and Title to—Proof of Title—Burden of Proof—" Critical Date " in respect of Evidence of Title—Manifestations of Exercise of Sovereignty as Element in Opposing Claims to Sovereignty—Assessment of Relative Value of Manifestations of Exercise of Sovereignty—Admission of Title—Probative Value of.

THE MINQUIERS AND ECREHOS CASE

(*France v. United Kingdom*).

International Court of Justice.

(Vice-President Guerrero, Acting President; President Sir Arnold McNair, Alvarez, Basdevant, Hackworth, Winiarski, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro and Armond-Ugon, Judges.)

Judgment of November 17, 1953.

THE FACTS (as stated by the Court).—

" By a letter dated December 5th, 1951, the British Ambassador to the Netherlands transmitted to the Registry on behalf of his Government a certified copy of a Special Agreement concluded between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic, signed on December 29th, 1950, the instruments of ratification in respect of which were exchanged at Paris on September 24th, 1951. . . .

" The Preamble and Article I . . . of the Special Agreement were in the following terms:

> ' The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the French Republic;
>
> Considering that differences have arisen between them as a result of claims by each of them to sovereignty over the islets and rocks in the Minquiers and Ecrehos groups;
>
> Desiring that these differences should be settled by a decision of the International Court of Justice determining their respective rights as regards sovereignty over those islets and rocks;
>
> Desiring to define the issues to be submitted to the International Court of Justice;
>
> Have agreed as follows:

ARTICLE I

The Court is requested to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic. . . .'

" At the end of the arguments before the Court . . . the following final Submissions were presented by the Parties:

On behalf of the United Kingdom Government:

'The Court is asked to declare:

That the United Kingdom is entitled under international law to full and undivided sovereignty over all the Islets and Rocks of the Minquiers and the Écréhous groups:

(1) by reason of having established the existence of an ancient title supported throughout by effective possession evidenced by acts which manifest a continuous display of sovereignty over the groups;

alternatively,

(2) by reason of having established title by long continued effective possession alone, such possession being evidenced by similar acts.'

On behalf of the French Government:

'May it please the Court,

To adjudge and declare:

(1) that France possesses an original title to the islets and rocks of the Minquiers group on the one hand and the Ecrehos group on the other;

(2) that France has at all times confirmed this original title by an effective exercise of her sovereignty to the extent that the character of these islets and rocks lent itself to such an exercise;

(3) that the United Kingdom has been unable to establish that it had effective possession of these islets and rocks at the time of the conclusion of the Treaty of Paris of 1259, which made effective possession the necessary condition for English sovereignty over the various Channel Islands, or at any subsequent period;

(4) that by the Convention of August 2nd, 1839, the United Kingdom and France brought into being, between a line three miles from low water mark on the island of Jersey and an *ad hoc* line defined in Article 1 of the Convention, a zone in which fishery of every type should be common to the subjects of the two countries;

(5) that the islets and rocks of the Minquiers and Ecrehos groups, being within the common fishery zone as so defined, were, in 1839, subjected by the Parties to a régime of common user for fishery purposes, without the territorial sovereignty over these islets and rocks being otherwise affected by the said Convention;

(6) that the acts performed by each Party on the islets and rocks subsequently to August 2nd, 1839, are consequently not capable

of being set up against the other Party as manifestations of territorial sovereignty, with the result that such sovereignty belongs to-day to that one of the Parties to whom it belonged before August 2nd, 1839;

(7) that this " critical date " would still apply even if the construction put upon the Convention of August 2nd, 1839, by the French Government should be incorrect, since the Government of the United Kingdom was not unaware of this interpretation or of the possibility it afforded to the Government of the United Kingdom and to British subjects to benefit from the institution of a common user of the islets and rocks of the two groups for fishery purposes, as this resulted, in the mind of the French Government, from Article 3 of the Convention of August 2nd, 1839;

(8) that, even if the " critical date " should be fixed at a date subsequent to August 2nd, 1839, the acts of possession invoked by the Government of the United Kingdom do not satisfy the conditions required by international law for the acquisition or preservation of territorial sovereignty;

(9) that, furthermore, France in the nineteenth and twentieth centuries has performed the acts of sovereignty required, having regard to the special character of these islets, and has assumed the essential responsibilities inherent in her sovereignty;

(10) that, for these reasons, sovereignty over the islets and rocks of the Minquiers group and the Ecrehos group respectively belongs, in so far as these islets and rocks are capable of appropriation, to the French Republic.'

" The Submissions of the Parties should therefore be considered to be as follows:

" of the United Kingdom Government,

' that the United Kingdom is entitled under international law to full and undivided sovereignty over all the Islets and Rocks of the Minquiers and the Écréhous groups; '

" of the French Government,

' that, for these reasons, sovereignty over the islets and rocks of the Minquiers group and the Ecrehos group respectively belongs, in so far as these islets and rocks are capable of appropriation, to the French Republic '.

" By Article I of the Special Agreement, signed on December 29th, 1950, the Court is requested

' to determine whether the sovereignty over the islets and rocks (in so far as they are capable of appropriation) of the Minquiers and Ecrehos groups respectively belongs to the United Kingdom or the French Republic '.

The various other relevant facts relating to title and exercise of sovereignty over the islands are set out in the *Held* below.

Held (unanimously): that the sovereignty over the islets and rocks of the Ecréhos and Minquiers groups, in so far as these islets and rocks are capable of appropriation, belongs to the United Kingdom.

The Court said:

" Having thus been requested to decide whether these groups belong either to France or to the United Kingdom, the Court has to determine which of the Parties has produced the more convincing proof of title to one or the other of these groups, or to both of them. By the formulation of Article I the Parties have excluded the status of *res nullius* as well as that of *condominium*.

" In Article II the Parties have stated their agreement as to the presentation of the Pleadings ' without prejudice to any question as to the burden of proof ', a question which it is for the Court to decide. Having regard to the position of the Parties, both claiming sovereignty over the same territory, and in view of the formulation of the task of the Court in Article I, and the terms of Article II, the Court is of opinion that each Party has to prove its alleged title and the facts upon which it relies.

" By the Special Agreement the Court is requested to determine the sovereignty over the islets and rocks in so far as they are capable of appropriation. These words must be considered as relating to islets and rocks which are physically capable of appropriation. The Court is requested to decide in general to which Party sovereignty over each group as a whole belongs, without determining in detail the facts relating to the particular units of which the groups consist.

" These groups lie between the British Channel Island of Jersey and the coast of France and consist each of two or three habitable islets, many smaller islets and a great number of rocks. The Ecrehos group lies north-east of Jersey, 3.9 sea-miles from that island, measured from the rock nearest thereto and permanently above water, and 6.6 sea-miles from the coast of France, measured in the same way. The Minquiers group lies south of Jersey, 9.8 sea-miles therefrom and 16.2 sea-miles from the French mainland, measured in the same way. This group lies 8 sea-miles from the Chausey Islands which belong to France.

" Both Parties contend that they have respectively an ancient or original title to the Ecrehos and the Minquiers, and that their title has always been maintained and was never lost. The present case does not therefore present the characteristics of a dispute concerning the acquisition of sovereignty over *terra nullius*.

" The United Kingdom Government derives the ancient title invoked by it from the conquest of England in 1066 by William, Duke of Normandy. By this conquest England became united with the Duchy of Normandy, including the Channel Islands, and this union lasted until 1204 when King Philip Augustus of France drove the Anglo-Norman forces out of Continental Normandy. But his attempts to occupy also the Islands were not successful, except for brief periods when some of them were taken by French forces. On this ground the United Kingdom Government submits the view that all of the Channel Islands, including the Ecrehos and the Minquiers, remained, as before, united with England and that this situation of fact was placed on a legal basis by subsequent Treaties concluded between the English and French Kings.

" The French Government does not dispute that the Islands of Jersey, Guernsey, Alderney, Sark, Herm and Jethou continued to be held by the King of England; but it denies that the Ecrehos and Minquiers groups were held by him after the dismemberment of the Duchy of Normandy in 1204. After that event, these two groups were, it is asserted, held by the King of France together with some other islands close to the continent, and reference is made to the same medieval Treaties as those which are invoked by the United Kingdom Government.

" In such circumstances it must be examined whether these Treaties, invoked by both Parties, contain anything which might throw light upon the status of the Ecrehos and the Minquiers.

" The Treaty of Lambeth of 1217, to which the Parties have referred, cannot be said to contain anything which might elucidate this question. The Treaty of Paris of 1259, which appears to be the principal Treaty on which the Parties rely, enumerates in Article 4 all the lands which the King of England should hold in fee of the King of France in Saintonge beyond the river Charente as well as Bordeaux, Bayonne and Gascony and 'all the land which he holds on this side of the sea of England in fee and in demesne and the islands, if any there be, which the king of england holds which are of the realm of france, and he shall hold of us as peer of france and duke of Aquitaine '. These terms seem to refer to islands which the King of England held as Duke of Aquitaine, and not to the Channel Islands. But even assuming that these Islands were also included, the article refers in any case only to islands, if any there be, which are held by the English King. It does not say which islands were at that time held by him. Article 6 enumerates all the lands which the King of England relinquished ' in any part of the Realm of france or in the islands, if any are held by us or by our brother or by others in our or their behalf '. This text refers only to islands, if any, which are held by the King of France, without indicating which islands were so held. From the text itself of this Treaty nothing can therefore be deduced with regard to the status of the Ecrehos and the Minquiers. The Treaty of Calais of 1360 contains in Article 6 a clause providing that the King of England shall have and hold all islands which he ' now holds '. This provision must be considered as including those of the Channel Islands which the King held at that time. But as it is not said which of these Islands were held by the English King, it is not possible to draw from this text alone any conclusion as to the status of the islets in dispute. The Treaty of

Troyes of 1420 contains many far-reaching provisions, but it cannot be said to provide anything which might throw light upon the present dispute. Common to all these Treaties is the fact that they did not specify which islands were held by the Kings of England and France respectively. The Court would therefore not be justified in drawing from them any conclusion as to whether the Ecrehos and the Minquiers at the time when these Treaties were signed were held either by the English or by the French King. This question depends on facts which cannot be deduced from the text of these Treaties.

" There are, however, other documents which provide some indication as to possession of the islets in dispute.

" By a Charter of January 14th, 1200, King John of England granted to one of his Barons, Piers des Préaux, the Islands of Jersey, Guernsey and Alderney " to have and to hold of us by service of three knights' fees '. Three years later, by a Charter of 1203, Piers des Préaux granted to the Abbey of Val-Richer ' the island of Escrehou in entirety ', stating that the King of England ' gave me the islands ' (*insulas mihi dedit*). This shows that he treated the Ecrehos as an integral part of the fief of the Islands which he had received from the King. In an Order from the English King of July 5th, 1258, the Sub-Warden of the Islands was ordered ' to guard the islands of Gernere and Geresey, and the king's other islands in his keeping '. In Letters Patent of the English King, dated June 28th, 1360, it was provided that the ' keeper of the islands of Gerneseye, Jereseye, Serk and Aurneye, and the other islands adjacent thereto ' may have the keeping for a further period. The Truce of London of 1471 provided in Article 3 that the King of France would not make any hostile act against the Kingdom of England and other lands specially mentioned, including the Islands ' of guernsey, Jersey and alderney [and] other territories, islands, lands and lordships, which are, or will be, held and possessed by the said lord King of england or by his subjects '. A Papal Bull of January 20th, 1500, transferring the Channel Islands from the Diocese of Coutances to the Diocese of Winchester, mentioned ' the Islands of Jersey and Guernsey, Chausey, Alderney, Herm and Sark ', while two commercial Treaties of 1606 and 1655 mentioned only Jersey and Guernsey.

" Basing itself on facts such as these, the United Kingdom Government submits the view that the Channel Islands in the Middle Ages were considered as an entity, physically distinct from Continental Normandy, and that any failure to mention by name any particular island in any relevant document, while enumerating other Channel islands, does not imply that any such island lay outside this entity. Having regard to the above-mentioned documents, and particularly to the Charters of 1200 and 1203, and in view of the undisputed fact that the whole of Normandy, including all of the Channel Islands, was held by the English King in his capacity as Duke of Normandy from 1066 until 1204, there appears to be a strong presumption in favour of this British view. If the Ecrehos and Minquiers were never specifically mentioned in such enumerations, this was probably due to their slight importance. Even some of the more important Islands, such as Sark and Herm, were only occasionally mentioned by name in documents of that period, though they were held by the English King just as were the three largest Islands. The Court does not, however, feel that it can draw from these considerations alone any definitive conclusion as to the sovereignty over the Ecrehos and the Minquiers, since this question must ultimately depend on the evidence which relates directly to the possession of these groups.

" The French Government derives the original title invoked by it from the fact that the Dukes of Normandy were the vassals of the Kings of France, and that the Kings of England after 1066, in their capacity as Dukes of Normandy, held the Duchy in fee of the French Kings. It is contended that the Channel Islands became added to the fiefs of the Duke of Normandy when William Longsword in 933 received the Islands in fee of the King of France, and that he, as well as his successors, did homage to the French Kings for the whole of Normandy, including the Islands. The French Government further relies on a Judgment of April 28th, 1202, of the Court of France and contends that King John of England was thereby condemned to forfeit all the lands which he held in fee of the King of France, including the whole of Normandy. On the basis of this historical origin and of the Judgment of 1202, there is, in the opinion of that Government, a presumption in favour of the present French claim to sovereignty over the Ecrehos and the Minquiers.

" The United Kingdom Government contends that the feudal title of the French Kings in respect of Normandy was only nominal. It denies that the Channel Islands were received by the Duke of Normandy in fee of the King of France, and that William Longsword or any of his successors ever did homage for the Islands. It contests the validity, and even the existence, of the Judgment of 1202, and asserts that even if such a Judgment was validly pronounced against the English King in his capacity as Duke of Normandy, it could not have the alleged consequences.

" These opposite contentions are based on more or less uncertain and controversial views as to what was the true situation in this remote feudal epoch. For the purpose of deciding the present case it is, in the opinion of the Court, not necessary to solve these historical controversies. The Court considers it sufficient to state as its view that even if the Kings of France did have an original feudal title also in respect of the Channel Islands, such a title must have lapsed as a consequence of the events of the year 1204 and following years. Such an alleged original feudal title of the Kings of France in respect of the Channel Islands could to-day produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement. It is for the French Government to establish that it was so replaced. The Court will later deal with the evidence which that Government has produced with a view to establishing that its alleged original title was replaced by effective possession of the islets in dispute.

" With regard to the Judgment of 1202 invoked by France it is the opinion of the Court that, whatever view is held as to its existence, validity, scope and consequences, it was not executed in respect of the Channel Islands, the French Kings having failed to obtain possession of these Islands except for brief periods. Even if this feudal Judgment, assuming that it was in fact pronounced, was intended to produce legal effects at that time, it remained in any case inoperative with regard to the Channel Islands. To revive its legal force to-day by attributing legal effects to it after an interval of more than seven centuries seems to lead far beyond any reasonable application of legal considerations.

" The view is expressed by the French Government that the dismemberment of the Duchy of Normandy, which in fact occurred in 1204 when Continental Normandy was occupied by the King of France, has legal consequences in the present dispute. It is said that if the United Kingdom Government is unable to establish its claim to the Ecrehos and the Minquiers, the title to these islets must be considered as having remained with France since 1204. But since that time there has been a further development in the territorial position. Many wars and peace settlements between the two States succeeded each other during the following centuries. The Channel Islands, or some of them, were occupied temporarily by French forces during some years immediately following the events in 1204, as well as for brief periods in the next two centuries, and Continental Normandy was reconquered by the English King and held by him for a long period in the fifteenth century. In such circumstances it is difficult to see why the dismemberment of the Duchy of Normandy in 1204 should have the legal consequences attributed to it by the French Government. What is of decisive importance, in the opinion of the Court, is not indirect presumptions deduced from events in the Middle Ages, but the evidence which relates directly to the possession of the Ecrehos and Minquiers groups.

" Before considering this evidence, the Court will examine some questions which concern both groups.

" On August 2nd, 1839, France and the United Kingdom concluded a Convention concerning fishery, and particularly the oyster fishery between the Island of Jersey and the neighbouring coast of France. It is common ground between the Parties that this Convention did not settle the question of sovereignty over the Ecrehos and the Minquiers. But the French Government has submitted contentions which to a certain extent affect that question. These contentions, which were modified during the proceedings, were at the public hearing on October 8th, 1953, formulated as follows, as part of the Submissions presented on behalf of that Government:

> '(4) that by the Convention of August 2nd, 1839, the United Kingdom and France brought into being, between a line three miles from low water mark on the island of Jersey and an *ad hoc* line defined in Article 1 of the Convention, a zone in which fishery of every type should be common to the subjects of the two countries;
>
> (5) that the islets and rocks of the Minquiers and Ecrehos groups, being within the common fishery zone as so defined, were, in 1839, subjected by the Parties to a régime of common user for fishery purposes, without the territorial sovereignty over these islets and rocks being otherwise affected by the said Convention;
>
> (6) that the acts performed by each Party on the islets and rocks subsequently to August 2nd, 1839, are consequently not capable of being set up against the other Party as manifestations of territorial sovereignty, with the result that such sovereignty belongs to-day to that one of the Parties to whom it belonged before August 2nd, 1839.'

"These contentions were based on the first three Articles of the Convention, and particularly on Article 3. By Article 1 an *ad hoc* line is acknowledged by the two Governments 'as defining the limits between which and the French shore the oyster fishery shall be reserved exclusively to french subjects'. Article 2 provides that 'oyster fishery within three miles of the Island of Jersey, calculated from lower water mark, shall be reserved exclusively to british subjects'. Article 3 provides as follows:

> 'The oyster fishery outside of the limits within which that fishery is exclusively reserved to french and british subjects respectively, as stipulated in the preceding articles, shall be common to the subjects of both countries.'

"The French Government asserts and the United Kingdom Government denies that the Ecrehos and Minquiers groups are included within this agreed common fishery zone, the United Kingdom Government basing itself on a provision in Article 9 concerning exclusive right of fishery for British subjects within three miles from low water mark 'along the whole extent of the coasts of the British Islands'.

"The Court does not consider it necessary, for the purpose of deciding the present case, to determine whether the waters of the Ecrehos and Minquiers groups are inside or outside the common fishery zone established by Article 3. Even if it be held that these groups lie within this common fishery zone, the Court cannot admit that such an agreed common fishery zone in these waters would involve a régime of common user of the land territory of the islets and rocks, since the Articles relied on refer to fishery only and not to any kind of user of land territory. Nor can the Court admit that such an agreed common fishery zone should necessarily have the effect of precluding the Parties from relying on subsequent acts involving a manifestation of sovereignty in respect of the islets. The Parties could have established such a common fishery zone, including the waters of the groups, even if these groups had in 1839 been under the undisputed exclusive sovereignty of one of them; and they could equally have acquired or claimed exclusive sovereignty after 1839 and relied upon subsequent acts involving the manifestation of sovereignty, notwithstanding such an agreed common fishery zone, provided of course that the common fishery in this zone would not in any way be impaired thereby. The above-mentioned contention as to exclusion of acts subsequent to 1839 is, moreover, not compatible with the attitude which the French Government has taken since that time. It not only claimed sovereignty over the Ecrehos in 1886 and over the Minquiers in 1888, and later, but it has, in order to establish such a sovereignty, itself relied on measures taken subsequent to 1839, as referred to in its communications to the Foreign Office, dated August 27th, 1888, and July 15th, 1903, as well as in the present proceedings. Nor can the contention that the Court should determine to which Party sovereignty belonged in 1839, be considered as consistent with the Special Agreement of 1950, by which the Court is requested to determine to which Party sovereignty belongs at present. The Court is therefore unable to accept the above-mentioned contentions as to the effects of the Convention of 1839 on the question of the sovereignty over the Ecrehos and Minquiers groups.

" The Parties have further discussed the question of the selection of a ' critical date ' for allowing evidence in the present case. The United Kingdom Government submits that, though the Parties have for a long time disagreed as to the sovereignty over the two groups, the dispute did not become ' crystallized ' before the conclusion of the Special Agreement of December 29th, 1950, and that therefore this date should be considered as the critical date, with the result that all acts before that date must be taken into consideration by the Court. The French Government, on the other hand, contends that the date of the Convention of 1839 should be selected as the critical date, and that all subsequent acts must be excluded from consideration.

" At the date of the Convention of 1839, no dispute as to the sovereignty over the Ecrehos and Minquiers groups had yet arisen. The Parties had for a considerable time been in disagreement with regard to the exclusive right to fish oysters, but they did not link that question to the question of sovereignty over the Ecrehos and the Minquiers. In such circumstances there is no reason why the conclusion of that Convention should have any effect on the question of allowing or ruling out evidence relating to sovereignty. A dispute as to sovereignty over the groups did not arise before the years 1886 and 1888, when France for the first time claimed sovereignty over the Ecrehos and the Minquiers respectively. But in view of the special circumstances of the present case, subsequent acts should also be considered by the Court, unless the measure in question was taken with a view to improving the legal position of the Party concerned. In many respects activity in regard to these groups had developed gradually long before the dispute as to sovereignty arose, and it has since continued without interruption and in a similar manner. In such circumstances there would be no justification for ruling out all events which during this continued development occurred after the years 1886 and 1888 respectively.

" There is also another point concerning both groups which the Court will mention before dealing with each group separately. The United Kingdom Government has endeavoured to show that the groups must be considered as dependencies of Jersey and has referred to Article 38 of a Franco-British Fishery Convention of 1867, which was ratified but not brought into operation. This Article provided:

> ' The terms ' British Islands ' and ' United Kingdom ', employed in this Convention, shall include the Islands of Jersey, Guernsey, Alderney, Sark and Man, with their dependencies.'

" The United Kingdom Government has also invoked similar clauses in a Franco-British Submarine Telegraph Convention of 1859 and in a British Sea Fisheries Act of 1843.

" These various clauses indicate that there are islands or islets which are dependencies of such Channel Islands as are enumerated; but no evidence is produced showing that it was the intention of the contracting Parties to include the Ecrehos and Minquiers groups within the terms ' British Islands ' or ' dependencies ' or, on the other hand, to exclude the groups from these terms.

" The Court will now consider the claims of both Parties to sovereignty over the *Ecrehos* and begins with the evidence produced by the United Kingdom Government.

" It has already been mentioned that the Charter of 1200 of the English King, whereby he granted the fief of the Channel Islands to Piers des Préaux, and the Charter of 1203, whereby the latter in turn granted the Ecrehos to the Abbey of Val-Richer, show that the Ecrehos were treated by him as an integral part of his fief.

" The grant of the Ecrehos was in frankalmoin. The French Government contends that such a grant had the effect of severing the feudal link between Piers des Préaux and the Abbey, so that the Ecrehos no longer formed a part of the fief of the Channel Islands. The view submitted by that Government is that the Ecrehos remained subject to the Duke of Normandy through the intermediary of the Abbey of Val-Richer, which was situated on the French mainland, and that, when the King of France succeeded to the rights of the Duke after the occupation of Continental Normandy in 1204, the Abbey 'passed under his protection, as did the Ecrehos, whose overlord he became'.

"This contention renders it necessary to consider the Charter of 1203 more closely. It provided the following:

> '. . . . Noverit universitas vestra me divinæ pietatis intuitu concessisse & dedisse, & præsenti charta mea confirmasse Deo & ecclesiæ sanctæ Mariæ de Valle-Richerii, & monachis ibidem Deo servientibus, pro salute animæ Johannis illustris regis Angliæ, qui insulas mihi dedit, & pro salute animæ meæ, & patris & matris meæ, & omnium antecessorum meorum, insulam *de Escrehou* integre, ad ædificandam ibidem basilicam in honore Dei & beatæ Mariæ, ita ut divina ibidem celebrentur mysteria singulis diebus, habendam & possidendam libere & quiete, plenarie & honorifice, in liberam & puram & perpetuam eleemosynam, & quidquid in eadem insula poterunt augmentare & ædificare. Item concessi prædictis monachis quidquid ab hominibus meis *de Gersy*, & *de Gernesé*, & *de Aurene*, eis caritatis intuitu rationabiliter datum fuerit, salvo jure meo.' [*Gallia Christiana*, XI, col. 94, No. XXXII (Instrumenta).]
>
> [*Translation*]
>
> '. . . . Know ye all that I, having regard to the mercy of God, have granted and given and by my present charter have confirmed to God and to the church of St. Mary of Val-Richer and to the monks there serving God, for the salvation of the soul of John, illustrious king of England, who gave me the islands, and for the salvation of the souls of myself and of my father and mother and of all my ancestors, the island of Escrehou in entirety, for the building there of a church in honour of God and of the blessed Mary, so that the divine mysteries be daily celebrated there, to have and possess [it] and whatever in the same island they shall be able to increase and build, freely and quietly, fully and honourably, in free pure and perpetual alms. I have further granted to the aforesaid monks whatever by my men of Jersey, and of Guernsey, and of Alderney, having regard to charity, shall be reasonably given to them, saving my right.'

"It appears clearly from the *Grand Coutumier de Normandie* of the thirteenth century, chapters XXVIII and XXXII (de Gruchy edition, 1881, pp. 90-91 and 98), that land held in frankalmoin was a tenure, and that such a grant in frankalmoin to an ecclesiastical institution did not have the effect of severing feudal ties. The text of the first part of Chapter XXXII is as follows:

> "[*Translation*]
>
> 'They are said to hold by alms who hold lands given in pure alms to God and his servants, wherein the donors retain nothing to themselves or their heirs save only the patronal domain; and they hold from them by alms only, as from patrons. None can make

> alms out of any land, save only that which is his own therein. Wherefore note that neither the duke, nor barons, nor anyone, ought to sustain any detriment if their men make alms of the lands which they hold of them; and their lords shall exercise their justice and levy their rights in the lands so put in alms, notwithstanding.'

"This text shows that the grantor retained the 'patronal domain' (*dominium patronale*). According to this ancient Norman custom, Piers des Préaux did not by his grant drop out of the feudal chain as far as the Ecrehos was concerned. He continued to hold the Ecrehos as a part of his fief of the Channel Islands, with the Abbot of Val-Richer as his vassal and the King of England as his overlord, and the King continued to exercise his justice and levy his rights in the land so put in alms. By granting the Ecrehos in frankalmoin to the Abbey, Piers des Préaux did not, and could not, alienate the island from the fief of the Channel Islands; it remained a part of that fief.

"This view is contested by the French Government on the ground that Piers des Préaux had not in the Charter reserved any feudal service and that he therefore had not created any feudal tenure. It seems that no such condition for the creation of a '*teneure par omosne*', or frankalmoin, was required by the ancient Norman custom, as described in the *Coutumier*. But even assuming that a condition or reservation was required, the grant to the Abbey did contain such a condition or reservation. As is seen from the text of the Charter, the Abbey was to build a church in the Ecrehos 'so that the divine mysteries be daily celebrated there', and when the grant was said to be given 'for the salvation of the soul of John, illustrious king of England. . . . and for the salvation of the souls of myself and of my father and mother and all my ancestors', this could, in view of the custom at that time, only mean that a service of prayers was reserved in the Charter. That this must also have been the view of the Abbot himself and of his successors is seen from the records of certain *Quo Warranto* proceedings held in Jersey in 1309 before the King's itinerant Justices. The Assize Rolls show that a chapel had in fact been built in the Ecrehos, and that the Prior of that chapel, appearing before the Justices, gave evidence that he and his fellow monk, dwelling in the chapel throughout the whole year, 'always celebrate for the lord the King and his progenitors'. These records show that the Prior himself as well as the Justices called the grant a *tenura*.

"Shortly after his grant of 1203 Piers des Préaux forfeited the fief of the Channel Islands, which thereupon reverted to the English King and were administered by Wardens appointed by that King, except for certain periods in the thirteenth and the beginning of the fourteenth century, when the Islands were again granted in fee. Up to 1309, there is no indication that any change had occurred as to the connection of the Ecrehos with the Channel Islands.

" The object of the *Quo Warranto* proceedings of 1309 mentioned above was to enquire into the property and revenue of the English King. These proceedings, which were numerous, took the form of calling upon persons to justify their possession of property. The Abbot of Val-Richer was summoned before the King's Justices to answer regarding a mill and the *advocatio* of the Priory of the Ecrehos as well as a rent. As the mill was situated in Jersey and the rent was payable there, the proceedings in respect of these objects do not show anything with regard to the status of the Ecrehos. But the question of the *advocatio* is in a different position. Such a right of a patron to presentation to an ecclesiastical office was, according to an ancient Norman custom, considered and treated as a *jus in rem*, inherent in the soil and inseparable from the territory of the fief to which it was attached. (*Grand Coutumier de Normandie*, Chapter CXI, de Gruchy edition, p. 259; *Atiremens et Jugiés d'Eschequiers*, published by Génestal and Tardif, 1921, p. 7, § 18.) When therefore the Abbot of Val-Richer was summoned before the King's Justices in Jersey to answer for this *advocatio*, it must have been on the ground that the Ecrehos, to which the *advocatio* was attached, was within the domain of the English King. And when the Prior of the Ecrehos appeared as the Abbot's attorney in answer to the summons, jurisdiction in respect of the Ecrehos was exercised by the Justices, who decided that ' it is permitted to the said Prior to hold the *premissa* as he holds them as long as it shall please the lord the King '.

" The Prior of the Ecrehos became involved in three other legal proceedings in Jersey in the years 1323 and 1331. As they concerned events which occurred in Jersey, they do not throw any light upon the status of the Ecrehos, but they show that there was a close relationship between the Ecrehos and Jersey at that time. Further evidence of this relationship is give by Letters of Protection, which, on August 18th, 1337, shortly before the outbreak of the Hundred Years War between England and France, were granted by the English King to ten Priors of Jersey and Guernsey, including the Prior of the Ecrehos, who was described as ' *Prior de Acrehowe de Insula de Iereseye* '. Such protection was apparently accorded to him because the Priory was under the authority of the English King.

" In his Charter of 1203 Piers des Préaux ' granted to the aforesaid monks whatever by my men of Jersey and of Guernsey and of Alderney, having regard to charity, shall be reasonably given to them, saving my right '. That such gifts were in fact given to the Priory of the Ecrehos is shown by subsequent documents, such as an account of the Warden of the Channel Islands for 1328-1329, a list of rents in a fifteenth century rental and in other rentals of Jersey showing wheat-rents due by certain Jersey parishioners ' by cause of Escrehoo ' in 1528 and some later years. It is explained that these wheat-rents, which formerly were due to the Priory, had been appropriated by the English King as a result of confiscatory measures taken against 'alien priories'. Both Parties have endeavoured to draw from this fact conclusions as to the status of the Ecrehos. The French Government contends that the confiscation of the Ecrehos rents can only be ascribed to the fact that the Priory was regarded as foreign; it was the result of measures taken against 'alien priories'. The United Kingdom Government asserts that this term meant priories established on English soil whose mother church was situated on foreign territory. The Court cannot find that the Parties have justified their respective contentions in this regard. It appears that it was as a result of these confiscatory measures that the Priory, having lost its means of subsistence, some time later was abandoned and the chapel fell into ruins. The close relationship between the Ecrehos and Jersey ceased and for a considerable period thereafter the islets were only occasionally visited by Jerseymen for the purpose of fishing and collecting seaweed.

"In 1706 fishermen from Jersey proceeding to the Ecrehos came across a Frenchman there who had just fled from police prosecution in France, and at his request they brought him to Jersey, where he was examined by the authorities. The United Kingdom Government has relied on this examination, but it cannot be considered as an excise of jurisdiction in respect of the Ecrehos. It was a measure which would naturally have been taken against any fugitive arriving in Jersey who was a national of another State.

"In 1754 plague broke out at Rouen and, as a sanitary measure, the States of Jersey issued an Act providing *inter alia:*

> 'Qu'aucun Vaisseau ou Bateau venant du Royaume de France ne sera souffert à entrer dans aucun Havre, ni mettre à Terre Aucun Passagers ou Marchandises en aucun Endroit de cette Isle, pareille Deffence etant faite à l'egard des Iles & Rochers de Chauzé, Marqués, & Icrehots, ou Rochers adjacents.'

"Both Parties have invoked this Act, but its text is ambiguous. It may signify a ban on traffic from France to these islands and rocks, thereby involving a manifestation of authority in respect of them. But the text may also mean that traffic to Jersey from France, as well as from these islands and rocks is forbidden, as in a previous prohibition in 1720. The prohibition could then be explained by the fact that it was impossible to create a sanitary barrier round the Minquiers and the Ecrehos, and that therefore it became necessary to defend Jersey against the dangers of infection spreading from these islets. But even if this were the case, it would not follow that these islets were regarded as foreign territory.

"From the beginning of the nineteenth century the connection between the Ecrehos and Jersey became closer again because of the growing importance of the oyster fishery in the waters surrounding the islets, and Jersey authorities took, during the subsequent period, action in many ways in respect of the islets. Of the manifold facts invoked by the United Kingdom Government, the Court attaches, in particular, probative value to the acts which relate to the exercise of jurisdiction and local administration and to legislation.

" In 1826 criminal proceedings were instituted before the Royal Court of Jersey against a Jerseyman for having shot at a person on the Ecrehos. Similar judicial proceedings in Jersey in respect of criminal offences committed on the Ecrehos took place in 1881, 1883, 1891, 1913 and 1921. On the evidence produced the Court is satisfied that the Courts of Jersey, in criminal cases such as these, have no jurisdiction in the matter of a criminal offence committed outside the Bailiwick of Jersey, even though the offence be committed by a British subject resident in Jersey, and that Jersey authorities took action in these cases because the Ecrehos were considered to be within the Bailiwick. These facts show therefore that Jersey courts have exercised criminal jurisdiction in respect of the Ecrehos during nearly a hundred years.

" Evidence produced shows that the law of Jersey has for centuries required the holding of an inquest on corpses found within the Bailiwick where it was not clear that death was due to natural causes. Such inquests on corpses found at the Ecrehos were held in 1859, 1917 and 1948 and are additional evidence of the exercise of jurisdiction in respect of these islets.

" Since about 1820, and probably earlier, persons from Jersey have erected and maintained some habitable houses or huts on the islets of the Ecrehos, where they have stayed during the fishing season. Some of these houses or huts have, for the purpose of parochial rates, been included in the records of the Parish of St. Martin in Jersey, which have been kept since 1889, and they have been assessed for the levying of local taxes. Rating schedules for 1889 and 1950 were produced in evidence.

" A register of fishing boats for the port of Jersey shows that the fishing boat belonging to a Jersey fisherman, who lived permanently on an islet of the Ecrehos for more than forty years, was entered in that register in 1872, the port or place of the boat being indicated as ' Ecrehos Rocks ', and that the licence of that boat was cancelled in 1882. According to a letter of June, 1876, from the Principal Customs Officer of Jersey, an official of that Island visited occasionally the Ecrehos for the purpose of endorsing the licence of that boat.

" It is established that contracts of sale relating to real property on the Ecrehos islets have been passed before the competent authorities of Jersey and registered in the public registry of deeds of that island. Examples of such registration of contracts are produced for 1863, 1881, 1884 and some later years.

" In 1884, a custom-house was established in the Ecrehos by Jersey customs authorities. The islets have been included by Jersey authorities within the scope of their census enumerations, and in 1901 an official enumerator visited the islets for the purpose of taking the census.

" These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Ecrehos during a long period of time.

" By a British Treasury Warrant of 1875, constituting Jersey as a Port of the Channel Islands, the 'Ecrehou Rocks' were included within the limits of that port. This legislative Act was a clear manifestation of British sovereignty over the Ecrehos at a time when a dispute as to such sovereignty had not yet arisen. The French Government protested in 1876 on the ground that this Act derogated from the Fishery Convention of 1839. But this protest could not deprive the Act of its character as a manifestation of sovereignty.

" Of other facts which throw light upon the dispute, it should be mentioned that Jersey authorities have made periodical official visits to the Ecrehos since 1885, and that they have carried out various works and constructions there, such as a slipway in 1895, a signal post in 1910 and the placing of a mooring buoy in 1939.

" The French Government, in addition to the alleged original feudal title considered above, has invoked the fact that the States of Jersey in 1646 prohibited the inhabitants of Jersey from fishing without special permission at the Ecrehos and the Chausey Islands, and that they restricted visits to the Ecrehos in 1692 because of the war between England and France. This shows, it is contended, that the Ecrehos were not considered as British territory. But the Court does not consider that this is the necessary or natural inference to be drawn from these facts.

" In the course of the diplomatic exchanges between the two Governments in the beginning of the nineteenth century concerning fisheries off the coast of Cotentin, the French Ambassador in London addressed to the Foreign Office a Note, dated June 12th, 1820, attaching two charts sent from the French Ministry of Marine to the French Ministry of Foreign Affairs purporting to delimit the areas within which the fishermen of each country were entitled to exclusive rights of fishery. In these charts a blue line marking territorial waters was drawn along the coast of the French mainland and round the Chausey Islands, which were indicated as French, and a red line marking territorial waters was drawn round Jersey, Alderney, Sark and the Minquiers, which were indicated as British. No line of territorial waters was drawn round the Ecrehos group, one part of which was included in the red line for Jersey and consequently marked as belonging to Great Britain and the other part apparently treated as *res nullius*. When the French Government in 1876 protested against the British Treasury Warrant of 1875 and challenged British sovereignty over the Ecrehos, it did not itself claim sovereignty, but continued to treat the Ecrehos as *res nullius*. In a letter of March 26th, 1884, from the French Ministry of Foreign Affairs to the French Minister of Marine, it was stated that the British

Government had not ceased to claim the Ecrehos as a dependency to the Channel Islands, and it was suggested that French fishermen should be prohibited access to the Ecrehos. It does not appear that any such measure was taken, and subsequently, in a Note to the Foreign Office of December 15th, 1886, the French Government claimed for the first time sovereignty over the Ecrehos '*à la lumière des nouvelles données historiques et géologiques*'.

"The Court, being now called upon to appraise the relative strength of the opposing claims to sovereignty over the Ecrehos in the light of the facts considered above, finds that the Ecrehos group in the beginning of the thirteenth century was considered and treated as an integral part of the fief of the Channel Islands which were held by the English King, and that the group continued to be under the dominion of that King, who in the beginning of the fourteenth century exercised jurisdiction in respect thereof. The Court further finds that British authorities during the greater part of the nineteenth century and in the twentieth century have exercised State functions in respect of the group. The French Government, on the other hand, has not produced evidence showing that it has any valid title to the group. In such circumstances it must be concluded that the sovereignty over the Ecrehos belongs to the United Kingdom.

"The Court will now consider the claims of both Parties to sovereignty over the *Minquiers* and begins with the evidence produced by the United Kingdom Government.

"The Rolls of the Manorial Court of the fief of Noirmont in Jersey contain three entries for the years 1615, 1616 and 1617 concerning certain objects shipwrecked at the Minquiers. The first two entries state that certain wreckage of a ship, believed to belong to Honfleur, and lost at the Minquiers, was carried off from the islets by certain named persons. The Court, which was held 'on this fief', ordered the Serjeant to take charge of the objects until other provision should have been made. The third entry states that a named person is 'in default towards the Officers of the Seigneur for having taken away an Anchor from the Minquiers and their neighbourhood and carried it to St. Malo'. The Court, which again was held 'on the fief', ordered that certain persons 'keep their day at the next Court, or answer in the superior Court if the circumstances shall require'. The United Kingdom Government contends and the French Government contests that these entries show that the Minquiers were a part of the fief of Noirmont.

"The *Grand Coutumier de Normandie*, to which the French Government has referred in this connection, deals with wreck in Chapter XVII (de Gruchy edition, pp. 48-50) and contains detailed statements as to custody and ownership. The wreck should be guarded and thereafter inspected by the Bailiff or his Officers, whereupon it should be given into custody of the lord of the fief or of " preudes hommes ' and kept during a year and a day in case the owner should come forward and claim it. The *Coutumier* enumerates the things to which the Duke of Normandy was entitled and continues: ' All things other than these shall enure to the lord in whose fief the wreck is found.'

" The Court inclines to the view that it was on the basis of this ancient Norman custom that the Manorial Court of Noirmont dealt with these two cases of wreck found at the Minquiers. It dealt with them on behalf of ' the lord in whose fief the wreck is found ', the lord of Noirmont. In the first case it ordered the Serjeant to take charge of the wreck, in the second case it declared a certain person to be ' in default towards the Officers of the Seigneur ' for having taken away the wreck, and it ordered some other persons to ' keep their day at the next Court '. As the jurisdiction of a local Court such as that of a Manor must have been strictly territorial and, in cases concerning wreck, limited to wreck found within the territory of its jurisdiction, it is difficult to explain its dealing with the two cases unless the Minquiers were considered to be a part of the fief of Noirmont.

" The United Kingdom Government has further invoked a Judgment of 1692 of the Royal Court of Jersey in litigation between the English King and the guardian of the Seigneur of the fief of Samarès in Jersey, concerning goods shipwrecked on the rocks of the Minquiers. The Court decided that the goods should be shared between the two litigants and the salvors, each taking a third, and it based this decision on ' certain Letters ' of the King's Privy Council of 1620 and on an Act of 1632. As these documents are not produced, it cannot be seen on what ground the Judgment was based. It is therefore not possible to draw from this Judgment any conclusion supporting the British claim to the Minquiers.

" In 1779 the Jersey Piers and Harbours Committee made an order for subsidizing the owner of a boat for the use of his boat and for services rendered by him and his crew ' who have been at the Minquiers for the purpose of helping and saving persons who, there was reason to think, had been shipwrecked there '. This shows that the Committee was interested in ensuring such services at the Minquiers, but it can hardly be considered as a measure by which authority was exercised in respect of the islets, nor can it be concluded that the Committee made the grant only because it considered the Minquiers to be a part of Jersey. The United Kingdom Government has further invoked two Judgments of 1811 and 1817 of the Royal Court of Jersey relating to salvage services rendered by Jerseymen to two ships wrecked at the Minquiers. The cases appear to have been ordinary salvage cases, and it is not shown that the Royal Court of Jersey would have lacked jurisdiction if the salvage had taken place outside the territory of Jersey.

" The further evidence produced by the United Kingdom Government in respect of the Minquiers is of the same character as that considered above in connection with its claim to the Ecrehos. As already mentioned, the law of Jersey has for centuries required the holding of an inquest on corpses found within the Bailiwick. Such inquests on corpses found at the Minquiers were held in 1850, 1938 and 1948 and show that jurisdiction was exercised in respect of these islets.

" Since about 1815, and perhaps earlier, persons from Jersey have erected and maintained some habitable houses or huts also on the islets of the Minquiers, where they have stayed during the fishing season. Some of these houses or huts have, for the purpose of parochial rates, been included in the records of the Parish of Grouville in Jersey, and property taxes have been paid by the owners. Rating schedules for 1939 and 1950 are produced.

" It is established that contracts of sale relating to real property in the Minquiers have, as in the case of the Ecrehos, been passed before the competent authorities of Jersey and registered in the public registry of deeds of the Island. Examples of such registration of contracts are given for 1896, 1909 and some later years.

" In 1909 Jersey customs authorities established in the Minquiers a custom-house with the arms of Jersey. The islets have been included by Jersey authorities within the scope of their census enumerations, and in 1921 an official enumerator visited the islets for the purpose of taking the census.

" These various facts show that Jersey authorities have in several ways exercised ordinary local administration in respect of the Minquiers during a long period of time.

" Of other facts throwing light upon the dispute it should be mentioned that Jersey authorities have made periodical official visits to the Minquiers since 1888, and that they have carried out various works and constructions there, such as a slipway in 1907, a mooring buoy in 1913, and a number of beacons and buoys in 1931 and later years and a winch in 1933.

" The evidence thus produced by the United Kingdom Government shows in the opinion of the Court that the Minquiers in the beginning of the seventeenth century were treated as a part of the fief of Noirmont in Jersey, and that British authorities during a considerable part of the nineteenth century and in the twentieth century have exercised State functions in respect of this group.

" The French Government has, in addition to the alleged original feudal title, invoked certain facts. It contends that the Minquiers have been a dependency of the Chausey Islands, which, according to the view of that Government, have always belonged to France, and which in 1022 were granted by the Duke of Normandy to the Abbey of Mont-Saint-Michel. It has referred to a Papal Bull of 1179 which confirmed this Abbey in all its possessions, among which the Bull mentioned '*totam insulam de cause cum pertinentiis suis*'. But from this general clause about appurtenances to the Chausey Islands no deduction can be made with regard to the status of the Minquiers. The United Kingdom Government has, on the other hand, contended that the Chausey Islands belonged to England until about 1764. But the Court does not, for the purpose of deciding the present case, consider it necessary to determine at what time the Chausey Islands became a French possession.

" In 1784 a French national submitted to the French Minister of Marine an application for a concession in respect of the Minquiers, an application which was not granted. The correspondence between the French authorities, relating to this matter, does not disclose anything which could support the present French claim to sovereignty, but it reveals certain fears of creating difficulties with the English Crown.

" In 1831 a French national made a hydrographical survey of the Minquiers group; but a British Naval officer, on instructions from the British Admiralty, surveyed both the Minquiers and the Ecrehos as early as 1813-1815.

" The French Government further contends that since 1861 it has assumed the sole charge of the lighting and buoying of the Minquiers for more than 75 years, without having encountered any objection from the United Kingdom Government. The buoys were placed outside the reefs of the group and purported to aid navigation to and from French ports and protect shipping against the dangerous reefs of the Minquiers. In 1888 a French mission, appointed to make a hydrographic survey of the islets, erected provisional beacons on several of them to facilitate the survey.

" The French Government has also relied on the fact that the French Prime Minister and the Air Minister in 1938 travelled to the Minquiers in order to inspect the buoying, and that a Frenchman in 1939 erected a house on one of the islets with a subsidy from the Mayor of Granville. It has finally referred to certain recent hydro-electric projects for the installation of tidal power plants in the Bay of Mont-Saint-Michel and the region of the Minquiers islets.

" The Court does not find that the facts, invoked by the French Government, are sufficient to show that France has a valid title to the Minquiers. As to the above-mentioned acts from the nineteenth and twentieth centuries in particular, including the buoying outside the reefs of the group, such acts can hardly be considered as sufficient evidence of the intention of that Government to act as sovereign over the islets; nor are those acts of such a character that they can be considered as involving a manifestation of State authority in respect of the islets.

" A perusal of the diplomatic exchanges between the two Governments from the beginning of the nineteenth century confirms this view. By his Note of June 12th, 1820, to the Foreign Office, already referred to above, the French Ambassador in London transmitted a letter from the French Minister of Marine of September 14th, 1819, to the French Foreign Minster, in which the Minquiers were stated to be '*possédés par l'Angleterre*', and in one of the charts enclosed the Minquiers group was indicated as being British. It is argued by the French Government that this admission cannot be invoked against it, as it was made in the course of negotiations which did not result in agreement. But it was not a proposal or a concession made during negotiations, but a statement of facts transmitted to the Foreign Office by the French Ambassador, who did not express any reservation in respect thereof. This statement must therefore be considered as evidence of the French official view at that time. When the British Embassy in Paris, in a Note of November 12th, 1869, to the French Foreign Minister, had complained about alleged theft by French fishermen at the Minquiers and referred to this group as 'this dependency of the Channel Islands', the French Minister, in his reply of March 11th, 1870, refuted the accusation against French fishermen, but made no reservation in respect of the statement that the Minquiers group was a dependency of the Channel Islands. It was not until 1888, that France, in a Note of August 27th, for the first time made a claim to sovereignty over that group, a claim which appears to have been provoked by a visit to the islets of the Jersey Piers and Harbours Committee. In 1929 a French national, M. Leroux, commenced the construction of a house on one of the islets of the Minquiers in virtue of a lease issued by French Government officials. In a Note of July 26th, 1929, the United Kingdom Government protested and said that they 'have no doubt that the French Government, in order to obviate all risk of the occurrence of some untoward incident on the spot, will restrain Monsieur Leroux from proceeding further with his building operations'. No reply appears to have been given by the French Government; but the construction of the house was stopped. That it was stopped at the instigation of that Government appears to follow from a Note of October 5th, 1937, from the French Ambassador to the Foreign Office, where it was stated that 'the French Government, moreover, in spite of the slight distance between the Minquiers islands and the Chausey islands, did not hesitate, a few years ago, to prevent the acquisition of land on the Minquiers by French nationals'.

"In such circumstances, and having regard to the view expressed above with regard to the evidence produced by the United Kingdom Government, the Court is of opinion that the sovereignty over the Minquiers belongs to the United Kingdom."

[Report: *I.C.J. Reports*, 1953, p. 47.]

In his Individual Opinion Judge Basdevant said:

"While concurring in the operative part of the Judgment, I am bound to say that the reasons for which I do so are to a great extent different from those stated by the Court. I therefore think that I should indicate in outline, but without exhaustive consideration of each separate point, the means by which I arrive at agreement with the operative part. I do not propose, in doing this, to embark upon a criticism of the reasoning adopted by the Court, nor to express my views on all the points dealt with in the at times over-complete arguments of the Parties; to do either would be to go beyond the bounds within which an individual opinion ought, in my view, to be kept. I shall not indeed indicate the particular points on which I am in agreement with the reasons given by the Court.

" In my view the present proceedings are essentially concerned with the interpretation, in so far as it affects the Ecrehos and the Minquiers, of the division of the Duchy of Normandy in the Middle Ages between the King of England and the King of France, the United Kingdom being now the successor to the rights of the King of England while the French Republic is the successor to the rights of the King of France. The problem was posed in this form by Sir Lionel Heald at the hearing on September 17th. Reference to this idea of division is made on a number of occasions in the course of the arguments of Professor Wade and of Professor Gros.

" Sir Lionel Heald placed this division, the effect of which has to be determined, in the thirteenth century. In reality the facts constituting the division were spread over a longer period. The division was indeed effected as a result of a series of acts of war, acts of possession and treaties in the course of the thirteenth and fourteenth centuries. Both Parties go back to all these factors to find the historic titles upon which they seek to rely.

" At the very beginning of the thirteenth century, immediately before the division of Normandy, the Ecrehos and the Minquiers formed a part of this Duchy and were subject to its Duke. The King of England, as such, did not then possess any rights there: the Duke of Normandy's conquest of England in 1066 and his acquisition of the title of King of that country cannot have conferred upon the King of England, as such, any title to the possessions of the Duke of Normandy. The two crowns, one royal, the other ducal, were vested in the same person, but legally they remained distinct. This situation was in complete consonance with the law of the feudal period, which was to subsist in the time of the conception of the princely State only to give way with the growth of the conception of a national State, leaving traces even in modern times and indeed until the present day. For the King of England to have any place in the status of Normandy it is necessary for him to be substituted for the Duke of Normandy: such a novation was to take place in the course of the events by which the division which has to be interpreted was effected.

" Immediately before the division of Normandy the King of France was the suzerain of the Duke of Normandy. The title which he thus possessed to the Duchy and to the islands which formed a part of it was not merely a nominal title. The Judgment of 1202, the forfeiture which resulted from it, certain provisions of the Treaty of Troyes of 1420 and indeed the terminology of the Treaty of Paris of 1259, which uses the word ' give ' to indicate what was done by the suzerain, the King of France, when, in respect of certain territories, he released the King of England from the effects of the forfeiture, all these factors go to show that this was so. Suzerainty, however, is not sovereignty. For the French Republic to be able now successfully to rely upon the ancient title of the King of France, it is necessary to show that this ancient title became augmented as a result of the disappearance, from beneath the King of France and in respect of the disputed islets, of the vassal, the Duke of Normandy. A transformation of this sort occurred in the case of Continental Normandy in the course of the events which brought about the division. What has to be determined is whether such a transformation enured to the benefit of the King of France in respect of the Ecrehos and the Minquiers, or whether the birth of some new and independent right over these islets, a right vested in the King of England, prevented such a result. This is the real question, and it is unnecessary to go into the contention that the suzerainty of the King of France lapsed as a result of the disappearance of the feudal system towards the end of the fifteenth century, a contention which makes light of the fact that up to the end of the seventeenth century the policy followed by the French Kings in regard to boundaries was linked to feudal principles, and of the fact that survivals of these principles remained until a much later date than this.

" The Judgment of 1202, with regard to which there has been controversy between the Parties, is not in itself relevant to the present case, for given as it was, against the Duke of Normandy, it did not affect the King of England. It did not deprive him of any right since the rights over Normandy belonged to the Duke and not to the King of England, and clearly it did not confer any right upon the King of England. It is therefore unnecessary to linger upon the doubts and criticisms to which this Judgment has given rise. The Judgment deserves to be mentioned here only because it is at the origin of the events marking, on the one hand, the beginning of the substitution of the King of England for the Duke of Normandy in regard to domination over Jersey, Guernsey and other islands, and, on the other hand, the beginning of the substitution of the sovereignty of the King of France for its suzerainty over Continental Normandy.

" King John, as Duke of Normandy, treated the Judgment of 1202 and the forfeiture which ensued as a result of it with defiance; he resisted the forfeiture, having recourse, for this purpose, to force which was available to him in his capacity as King of England. While the King of France eliminated his vassal from Continental Normandy, the King of England, after various vicissitudes, gained possession of the islands or of some of them. This marked the breaking up of Normandy, the division of what had been united under the authority of the Duke and the suzerainty of the King of France.

" In the course of these events, the King of England acquired *jure belli* and on his own behalf a title to the islands within his power, a title which was later to be confirmed by certain treaties. He thus became substituted for the Duke of Normandy in these islands. There was a novation of his title as a result of which ' some alternative administration had to be framed by the English Crown to replace that of the Duke of former years ', as is said in the Memorial (para. 26). The title thus acquired by the King of England may properly be invoked by the United Kingdom at the present day.

" Did this title of the King of England extend to the Ecrehos and the Minquiers ?

" The Treaty of Paris of 1259, which provided for the effects of the forfeiture, partly doing away with these and confirming the remainder, seems to me to refer, in Article 4, to the Channel Islands *inter alia*. It would seem to me to be difficult to hold that it had overlooked them, and when it speaks of land on this side of the sea of England and immediately afterwards mentions the islands, I am of opinion that it refers to the Channel Islands rather than to any other islands; if it adds that the King of England shall hold these islands ' as peer of France and Duke of Aquitaine ', this is because it was not possible to say in this Treaty that the King should hold them as Duke of Normandy. From Article 4 of this Treaty, and from the reference it contains to the liege homage of the King of England to the King of France in respect of all that the King of France ' gives ' to the King of England, it seems to me to emerge that the King of England received the Channel Islands which he held at the time of the Treaty, that he was to have them as vassal of the King of France who remained their suzerain as in the past.

" The Treaty of Calais or Brétigny of October 24th, 1360, went a step farther with regard to the right of the King of England. It indicated an agreement according to which the King of England should have and hold all the islands which he ' now holds '. His title to them was thus to be a complete one—he would no longer hold them as a vassal of the King of France. The rights of the King of France over these islands disappeared. This Treaty renders unnecessary further reference to the Treaty of 1259. It confirms the right which the King of England had acquired *jure belli*.

" To determine whether this right of the King of England, which supplanted that of the King of France, extended to the Ecrehos and the Minquiers, it is necessary to ascertain whether the King of England held these islets at the time of the Treaty of 1360. The Treaty imposes this condition, but it contains no clear indication as to whether the Ecrehos and the Minquiers are to be considered as forming part of the portion enuring to the King of England. This lack of precision is common in the treaties of the period; these are not concerned with precise definitions of boundaries but are based rather on feudal concepts of dependence; the history of the French monarchy up to the end of the seventeenth century is filled with a mass of disputes relating to the interpretation and application of instruments of this kind. From the fact that the Ecrehos and the Minquiers are not expressly mentioned here and from the fact that in other instruments they do not appear in one or another of the enumerations of islands, or that after the indication of certain islands there is or is not a reference to their dependencies, no conclusion can be drawn as to the sovereignty over the islets. It is necessary to have recourse to other elements for a decision.

" If it were a question of interpreting the Treaty of 1259, it would be necessary to have regard to the fact that the King of France by this Treaty ' gives ' the islands, on condition of liege homage, to the King of England who, until then and in that capacity, enjoyed no rights there save those which he had acquired by force of arms. In case of doubt, therefore, this Treaty should be interpreted in favour of the grantor, in the sense of restricting the gift. But what is in fact involved is the interpretation and application of the Treaty of 1360. This Treaty, however, does not make any reference to a gift by the King of France. It contains a statement of an agreement to the effect that the King of England should have the islands which he 'now holds'. This provision must be interpreted, not in a way *a priori* favourable to one Party rather than the other, but in a spirit of equality appropriate to the interpretation of the division effected in a century of confused strife.

"Were the Ecrehos and the Minquiers held by the King of England in 1360? No direct and positive evidence to this effect has been adduced. Moreover, I do not think that the Charter of January 14th, 1200, in favour of Piers des Préaux, or the Charter which the latter granted in 1203 for the establishment of a Priory on the island of Ecrehos can provide proof that in 1259, and still less in 1360, the King of England held this island and the islets and rocks within this group; these charters provide us with information as to the feudal dependence of the island of Ecrehos in 1200 and 1203, but they furnish no information as to the factual position existing in 1360.

"Holding the islands—this is an expression which is used in the Treaty of 1360 in the military sense; it refers to the situation created by the military strength of the King of England. So far as inhabited islands are concerned, this idea involves the establishment of English military authority in these islands, the possibility of action taken by the King's agents in respect of the inhabitants and, by the same token, the prevention of foreign action in the islands thus occupied. But none of these elements are to be looked for in the case of the Ecrehos and the Minquiers, islets and rocks which are practically uninhabited and most of which are uninhabitable. From a military point of view, for the King of England to hold them, it is not necessary that he should maintain a garrison there; it is sufficient that by reason of his military and naval power he should be in a position to intervene there when he considers it appropriate without being prevented from doing so by the forces of the King of France and that, by the same token, he should be in a position to prevent intervention by these forces. It would seem probable that the King of England, who had established himself on the principal Channel Islands and who remained there by virtue of the naval power available to him, was thus in a position to take such action in respect of the Ecrehos and the Minquiers. Without here introducing the concept of an archipelago, which is not in consonance with the geographical situation, the propinquity of these islets in relation to Jersey tends to confirm this probability. It would therefore seem that within the meaning of the Treaty of 1360, the disputed islets were then held by the King of England and that the condition imposed by the Treaty for their being assigned to him as part of the division was satisfied.

"It would be of very great assistance if it were possible to find confirmation of this probability in certain contemporary facts. The *Quo Warranto* proceedings of 1309, which can be considered relevant only with regard to a question of the *advocatio* raised therein, did not result in any expressed decision on this point and the arguments relied on before the Judges and accepted by them—the arguments relating to the poverty of the Priory—were quite unconnected with that part of the proceedings; the desired confirmation is not therefore to be found here. As to the actual relations with Jersey arising from the gifts made to the Priory by the inhabitants of that island or the occasional visits of the Prior of Jersey, these are at least counterbalanced by the relations and the ecclesiastical discipline then existing between the Priory of the Ecrehos and the Abbey of Val-Richer which was on French soil. Neither here nor in any similar facts is it possible to find anything which confirms or invalidates the hypothesis according to which the disputed islets would appear to have formed a part of the islands held by the King of England in 1360.

" The period which followed was one of strife in the course of which the advantage often lay with English arms. During a great part of this period Continental Normandy itself was in the hands of the King of England. The Treaty of Troyes of 1420, which made the King of England heir to the Crown of France—an inheritance of which subsequent events did not permit him to reap the fruits—expressly re-attached the Duchy of Normandy to the Crown of France, and it preserved the distinction between the two Kingdoms under the authority of one and the same ' King and sovereign lord '. Finally, this prolonged strife resulted in the maintenance of French domination in Continental Normandy and English domination in Jersey, Guernsey and other islands: the division was preserved by the later Treaties without its terms being clearly defined by them.

" Those which have been referred to in the arguments do not appear to me to assist the solution of the dispute. The Fishery Convention of 1839 is irrelevant on the question of sovereignty. It cannot, however, be completely disregarded. This Convention, indeed, by its provisions on common fishery, either directly or as the result of a traditional liberal interpretation dictated by the character of the places in question, furnished sufficient justification for fishery acts and even for acts of user of the islets in connection with fishing requirements; facts of this sort cannot thus be taken into consideration as providing any helpful indication on the question of sovereignty.

" All these elements provide no more than an interpretation which is probable but not backed by decisive proof, that the disputed islets were held by the King of England in 1360 and that they must therefore be regarded as having been acknowledged his by the Treaty of that year. Some doubt must still linger, however, since this interpretation would lead to the acceptance of the view that there was an increase in the rights of the King of England on these islets and a corresponding abandonment of his rights by the King of France in relation to what had been decided in the Treaty of 1259.

" This uncertain situation continued for a long period without any attempt being made to clarify it. On both sides a lack of interest was displayed in these islets, and when the disappearance of the Priory brought about the disappearance of the light which it had maintained on the island of Ecrehos for the guidance of fishermen, neither Jersey nor Val-Richer, it seems, was concerned to maintain the only public service which for centuries existed on these islets. When, in the nineteenth century, an interest was taken not in the islets themselves but in this area, this was concerned in the first place with the regulation of fisheries by the Convention of 1839, but the question of sovereignty over the islets was not raised. The question arose only in the last quarter of the nineteenth century.

"A great many facts have been relied upon in support of the rival claims of the two Governments to sovereignty over the disputed islets, particularly facts which occurred in the nineteenth and twentieth centuries. In considering such facts one must not lose sight of the fact that the dispute relates not to rival claims to have acquired sovereignty over territory which was *nullius*, but to the interpretation of the division which was effected in the Middle Ages. The fact that one State exercised its authority on the disputed islets or on some of them constitutes no more than the expression of that State's convictions with regard to its own sovereignty over the islets, if it be not merely a reflection of its desire, a desire without ulterior motives, to provide for the protection of its nationals in the absence of any established authority in the region: a unilateral expression of such convictions is not sufficient to invalidate a claim of the other State any more than a protest by one has this effect as against the other. There was at least a latent conflict between the two States as to the interpretation of the division, a conflict which it was not open to one of them to settle in its favour by a unilateral act. What must be ascertained in order to arrive at an interpretation of this ancient division which is now legally valid is, in the first place, whether the facts invoked reveal that either Government renounced its own claim or acknowledged that of the other Party. The discovery of such a fact or of such an admission would be sufficient to settle the issue. In the absence of a finding of this sort it is necessary to ascertain whether the facts invoked are consistent or inconsistent with the interpretation that the Treaty of 1360 placed the disputed islets within the portion assigned to the King of England, an interpretation so far based on the hypothesis, which is merely one of probability, that the King of England, who held the principal islands in 1360, also held the disputed islets.

"On the first point, it is necessary to determine the effect of the letter of September 14th, 1819, from the French Minister of Marine, of which a copy, together with a chart, was transmitted to the Foreign Office on June 12th, 1820, by the French Ambassador; this contained a reference to the 'islands of. . . . the Minquiers which are in the possession of England'. If it is to be taken literally, this reference would resolve the matter in respect of the Minquiers, but it seems to me that one cannot attribute such authority to it. This letter was forwarded only to provide certain clarification, in the course of negotiations relating to the protection of oyster fisheries and not to sovereignty; it emanated from a Minister without authority to make decisions pertaining to questions of territorial sovereignty and indeed it reveals certain serious lapses of memory on the part of its author; in London it was considered of so little weight that Canning, when drafting his instructions for the purpose of the ensuing negotiations, based himself on the ground of the State's exclusive fishery rights in its territorial waters and on that of reciprocity and, while admitting the existence of a belt of reserved fishery around the Chausey Islands — which he described as 'uninhabited' — made no provision for either the Minquiers or the Ecrehos. The words of the Minister of Marine would not therefore appear to amount to an admission upon which reliance can be placed at the present day. It would be equally wrong to construe Canning's silence upon this point as implying an acknowledgment by him that these islets were outside British sovereignty. For neither of the responsible statemen did this question arise at that time.

" Though in terms less explicit, the attitude of the two Governments with regard to a fishery incident in 1869 seems to me to be of greater significance so far as the substance is concerned. Some Jersey fishermen had then complained of certain depredations committed on the Minquiers for which they blamed French fishermen. But these facts did not give rise to any police acts or any exercise of jurisdiction on the part of the Jersey authorities such as might normally have followed from the British possession of sovereignty over these islets. These complaints were dealt with, at the request of the Jersey authorities, on a governmental level, that is to say, on a level where those who had to deal with them had authority to decide questions of territorial sovereignty. The complaints were the subject of a *démarche* by the British Embassy which requested the French Government to take appropriate measures; the latter Government undertook an enquiry the results of which it communicated to the Embassy. It can thus be seen that on this occasion the Government in London adopted an attitude which would seem to imply that it did not consider itself entitled to regard the Minquiers as a British possession. Such an interpretation can be avoided only if it be considered that that Government was then acting in a spirit of moderation desiring not to aggravate a trifling incident with regard to which the most important point was to ascertain whether the charge that had been made had any basis in fact.

" There was a similar incident in 1929, again in connection with the Minquiers, when one Le Roux started building there after a lease had been granted to him by the French Administration. Again the British authorities did not attempt to prevent him by the exercise of the police or jurisdictional powers which they claimed to possess on the Minquiers by virtue of territorial sovereignty. The British Government addressed itself to the French Government, requesting it to prevent Le Roux from carrying on with the building he had started, and this was done. In this case neither of the two Governments went as far as its contentions in relation to sovereignty over the Minquiers. The spirit of moderation which they both displayed can prejudice neither the one nor the other.

" It does not seem to me that one would be entitled to conclude from these facts, or from other facts of a similar nature, that there was any renunciation by either State of its claim to sovereignty over the disputed islets, or any acknowledgment of the rival claim.

" It thus becomes necessary to enquire whether the facts invoked on either side are such as to confirm or invalidate the interpretation according to which the medieval division resulted in the disputed islets being included in the portion of the King of England. We are not here concerned to seek the birth of any new title enuring to him, but rather confirmation of the correctness of a probable, though uncertain, interpretation of this division.

"As I have indicated, when I referred to the 1839 Convention and to the liberal construction which in practice was given to it, no conclusion can be drawn in this connection from the fishery acts or from acts connected with fishing.

"There are numerous facts, the existence of which has not been challenged—although there is disagreement as to the conclusions to be drawn therefrom—which show that the Jersey authorities have for a long time, on repeated occasions and in a consistent manner, concerned themselves with what was happening on the Ecrehos and the Minquiers and have acted accordingly. They have done so by the assumption of jurisdiction and by police and administrative acts. I have some hesitation in regarding the assumption of jurisdiction as the assumption of territorial jurisdiction. The facts to which the jurisdiction related occurred on islets which are not much more than emerged rocks on which there was no established authority, and they could thus easily furnish the occasion for an extension of jurisdiction just as if the wrong had been committed or the wreckage had been gathered on the high seas. Lord Finlay, in his opinion in Judgment No. 9, referred to this extension of jurisdiction in maritime cases (P.C.I.J., Series A, No. 10, p. 51). Jurisdiction was exercised with regard to Jerseymen; at the time of the incident of 1869 and in the case of Le Roux, instead of applying jurisdiction, recourse was had by the British Government to action by the French authorities. Such recourse is inconsistent with the essential characteristic of territorial jurisdiction which is its exercise in respect of all persons. Census operations extending to persons on the islets or to acts carried out there do not imply the exercise of a territorial competence; the same is true of rates imposed upon Jerseymen, in Jersey, in respect of property belonging to them on the islets; there is nothing to prevent a State's taxation of its nationals in respect of property abroad or its compilation of statistics of facts occurring abroad. The setting up of a custom-house on the islets by the Jersey authorities would seem to be more significant; but, in the first place, no information relating to operations carried on there has been submitted and, secondly, we read in a document of 1886 produced by the United Kingdom that '[French] customs cutters go once a week to the Ecrehos'. Finally, it must not be forgotten that international practice recognizes or tolerates customs control carried out by a State outside its territorial waters.

"If, moreover, Jerseymen prepared their instruments of purchase or conveyance of property on the islets in Jersey and in the forms usual there, this is to be regarded less as an exercise of public authority over these islets than as an adoption of the only practical means available to those concerned.

"At least the facts briefly mentioned above and other similar facts show that for a long time and in a consistent manner the Jersey authorities have taken an interest in what was happening on the Ecrehos and the Minquiers and that they took action in this connection to an extent and in a way appropriate to the character of these islets and the use which was made of them. They did this without encountering any competing action, still less any exclusive action, on the part of the French authorities. The latter displayed a far greater reserve. The French Government cannot be reproached for having sometimes sought a settlement of the dispute by means of compromise, but it is impossible not to have regard to the hesitation it showed for a long time to press its contentions and to the at least relative abstention of the French authorities from taking action with regard to what was happening on the Ecrehos and the Minquiers.

" From the facts thus alleged and, in particular, from the action of the Jersey authorities, unimpeded by competing action on the part of the French authorities, it is possible to deduce some *ex post facto* confirmation of the reasonableness of the hypothesis previously stated, according to which the King of England, who held the principal islands in 1360, was in a position to exercise power over the Ecrehos and the Minquiers and that he held these islets within the meaning of the Treaty.

" From these same facts it appears that, in the absence of the establishment of a separate local authority on the disputed islets, there was, to the extent permitted by the character of these islets, greater and more continuous activity on the part of the Jersey authorities than on the part of the French authorities and that in this way a tradition of the attachment of the islets to Jersey has grown up. This reveals the interpretation which in practice has been given to the division of 1360. An interpretation already manifested before the birth of controversy between the two Governments as to sovereignty which has subsisted in practice throughout the course of this controversy. This interpretation confirms the interpretation previously advanced.

" Thus the United Kingdom has, in modern times and at the present day, held the disputed islets so that the hypothesis that the King of England formerly held them appears to be reasonable. At the same time the medieval division has been interpreted in practice in the sense of an attribution of the islets to the King of England. All this, however, was done not in absolute terms but in a somewhat flexible manner; the British authorities have acted with moderation, hesitating to exercise the full rights which the United Kingdom now claims, addressing themselves to the French authorities in preference to taking action against Frenchmen. In order to maintain what has been established by practice on the basis of ancient instruments and of a liberal interpretation, this flexibility should likewise be maintained. But the Court has not been asked either in the Special Agreement or in the written proceedings or in the course of the arguments to prescribe such a maintenance.

" This being so, and in the light of the facts referred to above, the decision set forth in the Judgment appears to me to be justified."

In his Individual Opinion Judge Levi Carneiro said:

" Having voted in favour of the operative clause of the Judgment and accepted all the reasons in support thereof, I venture to add a few observations which have decisively influenced my personal vote. These observations relate to circumstances of a general character which, in my view, explain, confirm, co-ordinate and lend value to the acts of occupation which occurred at irregular intervals throughout the centuries and are not all sufficiently significant if taken individually.

" 2. *Criterion for the decision.*—In this Opinion I have confined myself to the following rules which were laid down by the Permanent Court of International Justice in the case concerning the Legal Status of Eastern Greenland:

" (*a*) the elements necessary to establish a valid title to sovereignty are ' the intention and will to exercise such sovereignty and the manifestation of State activity ' (pp. 46 and 63);

" (*b*) in many cases international jurisprudence ' has been satisfied with very little in the way of the actual exercise of sovereign rights, provided that the other State could not make out a superior claim. This is particularly true in the case of claims to sovereignty over areas in thinly populated or unsettled countries ' (p. 46);

" (*c*) it is the criterion of the Court in each individual case which decides whether sovereign rights have been displayed and exercised ' to an extent sufficient to constitute a valid title to sovereignty ' (pp. 63-64).

" 3. *Fief of the Channel Islands.*—Whilst not disputing the occupation of the Channel Islands as a whole in the eleventh century by the Duke of Normandy, King of England, the French Government contends that this occupation was a consequence of the grant made in 933 by King Raoul to William Longsword; that the fief of the Islands was thus constituted and that the Duke of Normandy, King of England, became a vassal of the King of France; and that the Duke and King on several occasions rendered the homage owed by him in this capacity. The United Kingdom Government rejects these contentions on the ground that the Islands were conquered in 916 by the Normans; that the fief was limited to the continental portion of Normandy; that the homage due in respect of this fief was merely nominal and was rendered solely having regard to the convenience or political interest of the vassal.

" We do not possess the instrument of the alleged grant in fee to William Longsword; it is not known whether this instrument included the Channel Islands; it has not been possible to define the exact scope of the homage allegedly rendered by the King of England to the King of France. The French Government has relied on a passage in Flodoard to the effect that the King gave to the Duke ' *terram Brittonam in ora maritima sitam* ', but it would appear that the only correct translation of this expression is ' Breton territory sited along the coast ', that is mainland territory bordering on the sea, but not islands. The French Government has challenged the assertion that the Islands were conquered by the Normans, on the ground that they ' were added to the other fiefs '. But it has not shown how this alleged addition was made. I consider it more plausible that the Islands were conquered by the powerful Norman warriors.

" It must be recognized, furthermore, that the vassalage of a king was necessarily exceptional and limited: Philip Augustus himself proclaimed in 1185 that ' the King must do fealty to no-one ' (Henri Regnault, *Manuel d'Histoire du Droit français*, p. 102). The suggestion that the King of England was obliged to do fealty to the King of France seems even less probable having regard to the fact that the power of the King of France at that time was considerably reduced (Pierre Gaxotte, *Histoire des Français*, Vol. 1, pp. 126, 324-325), whereas the authority of the Princes, Dukes and Counts in some forty feudal States was increasing. In the great fiefs, the authority of the King of France was at that time ' purely nominal ' (Glasson, *Histoire du Droit et des Institutions de la France*, tome IV, p. 487). Several domains kept to the very end ' their right of *sovereignty* ' (italics supplied) (Glasson, *op. cit.*). The Duke of Normandy in particular was a ' real *sovereign* ' (*idem*). Even on the continental territory of France, the powers of the Duke were not limited: he declared war and made peace, minted money, and was ' the sole great judge in his Duchy ' (*op cit.*, pp. 504-507, 508). Rollo had already founded ' a State which was practically independent ', ' under suzerainty that was completely nominal ' (*idem*, p. 497); ' the Duke of Normandy was one of the most absolute sovereigns of the Middle Ages ' (*idem*, pp. 497-498).

" In these circumstances I am unable to accept the view that the Duke of Normandy, having become King of England, and having retained the Channel Islands when the King of France drove him out of Continental Normandy, humbly remained subject to the suzerainty of his adversary. The same considerations make it impossible for me to suppose that the suzerainty of the King of France extended to the Channel Islands, all the more so since he did not conquer them as a whole at the beginning of the thirteenth century when he conquered Continental Normandy. Sound authority may be found for my opinion. For example, Selden, cited by Calvo, has written as follows:

> ' When Kings John and Henry III lost Normandy, the Islands of Jersey, Guernsey and *the other adjacent islands continued to remain under English sovereignty*.' (Italics supplied.) (Calvo, *Le Droit international*, 1870, Vol. I, p. 325.)

It is true that some authors state that the King of England retained the Islands ' *par foi et hommage du roi de France* ' ; the Reply itself has cited such authors (para. 121 and note 68). But in 1200 King John of England (Annexes A 8 and 9 to British Memorial) granted the Islands to Piers des Préaux without alluding in any way to the alleged suzerainty of the King of France. There is a further valid indication disproving the existence of this suzerainty in respect of the Islands; the King of England is said to have refused to recognize the vassalage alleged by the King of France; he is said to have refused to render the homage demanded. For this reason the Court of France confiscated his lands in 1202. The feudal link—in so far as it existed and without extending, in my opinion, to the Islands—was then severed; this is common ground between the Parties. (Oral Arguments.)

" 4. *The period of the Treaties.*—The strife between France and England which broke out after this decision of the Court of France extended beyond the thirteenth century and into the second half of the fifteenth century. The interruptions became longer and longer and peace treaties were ultimately concluded. In respect of this period, authentic documents are available. The Parties have submitted these texts and have debated the matter of their interpretation, but the literal interpretation is very doubtful. It is a well-known fact that cases brought before tribunals are always more or less doubtful and it is clearly because of these doubts that the Parties ask for a judicial interpretation. When a text is not clear, the circumstances in which a treaty was signed and the subsequent facts relating to its application must provide a sound basis for the interpretation. In the present case, the interpretation may also be based on other circumstances.

" 5. *Bases of interpretation.*—The treaties and other ancient documents with regard to which there has been lengthy argument have given rise to different interpretations. It is my view that the interpretation must be based on the adequate criterion in each particular case; I nevertheless consider that some bases may be found for this interpretation.

" The first is the historical moment; a peace treaty which is the result of a war and a decisive military victory probably favours the victor.

" A further factor in the present case is the continuous and keen interest shown by England in the Channel Islands, in contrast to a certain indifference or a much less lively and assiduous interest shown by France, at least after a certain period. A French geographer, Élisée Reclus, has written: ' Jersey, Guernsey and the *neighbouring lands* are therefore a *very precious possession* for Great Britain '. (Italics supplied.) (*Nouvelle Géographie universelle*, ed. 1881, Vol. II, p. 640.) And it may be readily understood why England's interest has always been more vigilant and why she has been more uncompromising in respect of France. The conflict of interests which gave rise to the fierce strife between 1202 and 1360, and even thereafter, became less acute when England ceased to dominate Continental Normandy in the fifteenth century and France renounced her attempt to conquer the Channel Islands.

" In the diplomatic correspondence which was exchanged in the nineteenth century concerning the present dispute, a number of unequivocal expressions may be found to suggest a certain indifference on the part of France. In a Note dated December 15th, 1886 (Annex A 41 to British Memorial), the French Ambassador submitted to the Foreign Office the titles which, to use his words, ' would permit France to establish her authority over the Ecrehos '; he added that the French authorities ' have in mind no purpose of a kind to cause concern to Her Majesty's Government '. The French Government made a number of significant proposals: it rejected a decision on sovereignty (A 64); it proposed the neutralization of the islets (A 64); it suggested compensations in other parts of the world (A 71-72). It is to be noted that during the present proceedings the French Government stated in its Counter-Memorial that ' the disputed areas cannot be declared to be capable of appropriation by one Party to the exclusion of the other and consequently the *status quo* must be maintained '. In 1819 the French Minister of Marine went so far as to acknowledge that the Minquiers were a British possession. That Government appears to have merely desired the continuation of the joint position which it considered had been established by the Convention of 1839.

" Several references have been made to the Minquiers and the Ecrehos by the French Government which suggest that they are practically of no value. Victor Hugo's definition of the Minquiers: ' a desolation in a barren waste ' has been repeated more than once (Oral Arguments). Reference has once been made to his words: ' There is nothing to be found there except shipwreck.' The Counter-Memorial has stated that ' three above-water islets in the Ecrehos group and one islet in the Minquiers group are habitable during the summer, although there are no springs '. With reference to the small dimensions of the rocks, it was said that on the Minquiers ' not a single blade of grass is to be found ', and, as regards the

Ecrehos, ' nothing can be grown there and habitation is difficult ' (Oral Arguments). The region of the islets has been described by the French Government as ' an arm of the sea sown with reefs ', and the Counsel for the United Kingdom Government expressed his surprise at this (Oral Arguments). It is true that the French Agent nevertheless referred, in addition to the interests of fishermen, to the ' fundamental ' importance of a project in connection with the Minquiers, which would double France's present electrical output (Oral Arguments). This is a recent project and this magnificent undertaking may not be immediately realized. In any case, I am of opinion that these interests may be taken into consideration (see Conclusion No. 23).

" On the other hand, the attitude of the British Government has always been to assert full and exclusive sovereignty, without restriction or concession of any kind.

" Accordingly, it is my view that England has not left the Channel Islands as a whole in the hands of France, particularly when England had just conquered France by force of arms. This could not even have followed from an inconceivable oversight.

" Despite the uncertainties of the more ancient facts, some bases may also be found for an exact interpretation of the instruments. The French Government has sought to rely on the argument that whenever some of the Channel Islands are mentioned, all the others are excluded: in such cases the enumerations are asserted to be exhaustive. In my opinion such references are almost invariably given ' as examples ', a view which is warranted by earlier historical facts and confirmed by subsequent facts. It is admitted in the Counter-Memorial that none of the ancient diplomatic instruments relating to the Channel Islands gives a complete enumeration. This is the case for the Treaty of Picquigny of 1475 (Rejoinder). Why ? Obviously because, having regard to the ' natural unity ' of the archipelago which they constitute, it was not necessary to enumerate the islands, for it would have been almost impossible to do so. In other words, whenever some of the islands were mentioned, particularly the main islands—or those which were then regarded as the main islands—it was to be assumed that the provision also covered the other islands which were not listed but which were included in the same archipelago.

6. *The Treaty of Lambeth* or the ' Draft Agreement ' of 1217 which terminated the strife which followed the Judgment of 1202 confirmed the English naval victories of Damme and Sandwich, as well as the failure of French attempts to take the Channel Islands. The terms of this Treaty and the historical moment at which it was concluded justify the view that all the Channel Islands were occupied by the English at that time. Following the naval victories, certain significant facts which are contemporaneous with the Treaty confirm English domination (Oral Arguments). I shall merely refer to the proclamation of the autonomy of the islands (Reports of 1199-1216, Annex A 154 to British Memorial) in which even the protection of the ports is recommended, having particular regard to the proximity of the King of France and other enemies. The French Government has admitted that this Treaty provides for the ' restoration ' of several islands to the King of England, but it has merely inferred therefrom that the islands were not in his possession at that time (Oral

Arguments). This inference is acceptable: there were islands which were not in the possession of the King of England; but these islands were 'restored' to him. The English obtained complete domination over the islands.

"Reference has been made to the instruments providing for the implementation of the restoration, which had been agreed upon in the Treaty by the same English admiral who had commanded the English fleet at the Battle of Sandwich. He was appointed Warden of the islands and subsequently replaced in this office by one of his nephews. (Memorial, Nos. 23-24.)

"Counsel for the United Kingdom Government has quoted two French historians who defined the scope of this Treaty: a Professor from Caen has stated that the islands 'were detached from Normandy in fact in 1204, in law by the Treaty of 1217'. (Oral Arguments.)

"The only impressive argument that has been raised against this Treaty is the contention that the Dauphin Louis acted 'in his own name, not having been delegated to do so by his father, King Philip Augustus' (Oral Arguments). I find it difficult to consider as no more than a mere personal adventure the Dauphin's expedition, which went as far as London in an effort, to use the words of the French Government, 'to repeat the exploit of William the Conqueror'. Having been unsuccessful in this enterprise, the Dauphin signed the Treaty of Lambeth with King Henry III of England; he subsequently became King of France as Louis VIII. He was bound to abide by his undertaking. For his part, King Henry III of England retook the main or 'the majority of the Norman islands' in the admission of the French Government (Counter-Memorial and Rejoinder). Why should he not have retaken all the Islands? Why should he have left some of them under French domination?

"It should also be noted that the United Kingdom does not even contend that the Treaty of Lambeth re-established the feudal link which had been severed more than fifty years before: the United Kingdom Government attributes this effect to the Treaty of Paris. It may therefore be said that after the Treaty of Lambeth all the Channel Islands were under English domination, without vassalage of any kind.

"7. *The Treaty of Abbeville-Paris.*—It is common ground between the Parties that the Treaty of Paris of 1259 is very important (Oral Arguments). The French Government actually purports to find its original title in that Treaty; it has asserted (Oral Arguments) that its original title was 'renewed and strengthened' by the Treaty of 1259. It then goes on to say that its tenth century title was incorporated in the Treaty of 1259, 'a treaty of frontiers, a treaty of boundaries' (Oral Arguments). Some of its remarks would appear to justify a claim to full ownership, not merely to suzerainty, of certain of the Channel Islands, but not of the Channel Islands as a whole. France has, however, preferred to rely throughout on her alleged suzerainty.

"I do not regard the Treaty of Paris as a treaty of frontiers. To do so would be to fall into the very error which we have been warned against: an instrument must not be appraised in the light of concepts which are not contemporaneous with it. The Treaty of Paris is a treaty of peace; it contains no provisions on frontiers and establishes no boundaries. In the opinion of the French Government, it re-established the homage due by the King of England to the King of France by virtue of the feudal link which the Judgment of 1202 had severed. How can it be argued that as a result of this fact the territories of the fief were incorporated in the Kingdom of France when these territories formerly belonged to England? No territorial alteration of any kind can have resulted from this mere fact: the personal link of vassalage alone was re-established.

" The Treaty of Paris contains no express reference to the Ecrehos or the Minquiers, or even to the Channel Islands in general. The only provisions which might be relevant to the present dispute are Articles 4, 6 and 7, which are reproduced in Annex A 1 to the Memorial.

" Doubts as to the interpretation of this Treaty arose immediately after its signature and were revived during the proceedings before this Court. The United Kingdom Government has asserted that by this Treaty King Henry III of England renounced all his claims to Continental Normandy; that after the Treaty, France having delayed or refused to implement the restoration of certain territories, a meeting was held at Périgueux in 1311 to resolve these differences; that France then asserted claims to the islands adjoining Normandy and to other lands; that England rejected these claims and continued to possess the Channel Islands (Memorial, para. 18).

" According to the Counter-Memorial, the King of England renounced Normandy and other lands in favour of the King of France, thus impliedly recognizing the validity of the Judgment of 1202; on the other hand, it is said to follow from Article 4 that the Duchy of Guyenne and various neighbouring regions were left, or returned as fiefs, to the King of England, who had to pay homage in respect of them to the King of France. Homage, it is asserted, was rendered in respect of all the islands subject to the King of France which were in the hands of the King of England, including the Channel Islands, which were situated ' on this side of the English sea ' and which previously were a part of the Duchy of Normandy (p. 197).

" In paragraph 129 of its Reply, the United Kingdom Government contends that the King of England acknowledged the suzerainty of the King of France over his possessions in France and over the islands which he held off Aunis and Saintonge, but that it ' appears improbable ' that the Channel Islands were included among the islands to which the Treaty refers; in any case, this homage is said to have been merely nominal and for a very short time. In the Rejoinder, the French Government asserts that in this, as in the subsequent treaties, ' there is never any question of any islands but those in the possession of the King of England '. The discussion on this point continued throughout the oral proceedings and could go on indefinitely as long as it is directed to the obscure wording of the Treaty.

" It is clear from the debate that France claims that the suzerainty of the King of France was re-established in respect of the Channel Islands (Oral Arguments); on the other hand, the United Kingdom considers that the fealty was re-established only in respect of Aquitaine and its islands, not in respect of the Channel Islands (Oral Arguments).

" Neither Party has succeeded in fully proving its own interpretation of the Treaty: it may well be that both interpretations are justified by the text of the Treaty. From the terms of the Treaty themselves, it is not possible to ascertain with certainty which were the islands ' possessed ' by England. In order to determine which islands were under French suzerainty, it is necessary to consider the situation which existed before the Treaty was signed, as well as the manner in which the Treaty was carried out. An authoritative and impartial historian, David Janey Hill, has pointed out that by this Treaty the King of England received the islands of Normandy in fee (*A History of Diplomacy*, Vol. I, p. 388). In the present proceedings the United Kingdom has cited another well-known author, Besnier, who wrote as follows:

> ' The King of France. . . . definitively acquired the sovereignty of Continental Normandy, but the King of England continued to hold the islands by faith and homage of the King of France ' (Reply, para. 121).

" Which islands ? Those of the Channel ? In the same sense, J. Havet (Reply). David J. Hill relates the Treaty of Paris to the defeat of King Henry III of England in 1242 and to a desire for peace on the part of King Louis IX of France. Louis is accordingly said to have given Henry, in addition to his heritage in Aquitaine, ' the Norman islands in fee to the Crown of France '. The King of France is alleged to have said thereafter: ' Henry was not my vassal but he has voluntarily become one.' The peoples of the two nations continued to be discontented: the English complained of ' the new vassalage ' and the French complained of the fact that the English continued to have a foothold on the Continent (*op. cit.*, I, pp. 388-389). The scope of this suzerainty was questioned after the Treaty of Paris and even after the Treaty of 1303 (*idem*, Vol. II, pp. 7-8).

" When the Treaty of Paris was signed, in contrast to the position at the time of the Treaty of Lambeth, France was victorious and strong, stronger than England, which had been vanquished and divided. Nevertheless, France did not take the Channel Islands back from England; Louis IX, Saint Louis, ' *l'homme juste* ', went even further by returning to him the lands of Aquitaine, being content to subject the King of England to his vassalage, even in respect of the Channel Islands, which the latter ' continued ' to occupy.

" The Treaty of Paris thus confirmed the Treaty of Lambeth, although it may well have established (or re-established, if it existed at the beginning of the thirteenth century) French suzerainty over the Channel Islands.

" It is conceivable that thenceforth the islands, as a fief, were subject to the King of France but in such a way that they continued to be occupied by England without England having acknowledged this vassalage. There is no evidence to show, nor any indication to suggest, that England acknowledged this vassalage in express terms. And if such vassalage had actually existed, England might have been expected to seek to rid herself of it as soon as possible.

" 8. *The Treaty of Brétigny-Calais.*—It is proper to recall, as an element in the interpretation of the Treaty of Calais, that it was signed at the beginning of the Hundred Years War and after the great English naval victory at Sluys in 1340 and a land victory at Poitiers in 1356, when King John the Good of France was taken prisoner by the English. Before the Treaty of Calais, a secret agreement was signed by the Royal prisoner in 1359, which provided for the restoration to the English Crown of all the Duchy of Normandy (Memorial, para. 19) ' with all the cities, castles, dioceses, lands, regions and places lying within the Duchy itself '. The French Government is quite right when it points out (Counter-Memorial, Part III, I, III) that this secret agreement was never ratified. But in my view it is not right in adding that the same agreement ' produced no effects ', for one of the effects was the Treaty of Calais, although the latter restricted the scope of the agreement, having regard to new developments. Although the Treaty of Calais did not restore to England, as the secret agreement had done, ' all the Duchy of Normandy '—i.e. Continental Normandy—it did nevertheless confirm in general terms the English possession of the islands, as had been done in the Treaties of 1217 and 1259. A very significant indication of this fact may be found in the absence of any express reference to the islands when the secret agreement refers to ' cities, castles, dioceses, lands, regions and places '. The purpose of the French attacks at the beginning of the Hundred Years War was to retake the Channel Islands; this is a fact which should not be forgotten.

" The absence of the reference is clear evidence that the islands were already English. If this were not so, England would certainly not have lost this opportunity—at least, in the secret agreement with its prisoner—to obtain the domain of the Channel Islands. With very significant emphasis, the Treaty stipulates that the King of England shall have and shall hold all the other islands which he already holds. It must be recognized that England dominated, and continued to dominate, the islands as a whole, and that she continued to possess them. ' In any event the islands had remained faithful to John Lackland in 1204, and the Treaty of Brétigny (1360) was to confirm their loss by France in express terms. Henceforth the French sought to re-conquer them solely by force of arms.' (Perrot, *Deux expéditions insulaires françaises*, p. 5.)

" The Treaty of Calais even ceded to the King of England—as is acknowledged by France (Oral Arguments)—' in full sovereignty ', several provinces and towns—Calais, Ponthieu, Poitou, Saintonge, Guyenne. How could it possibly have reserved the suzerainty of France over the islands which England already possessed ? The process of the disintegration of feudalism was already quite advanced. I do not believe that reference was ever made again to homage by the King of England to the King of France. The French Government (Oral Arguments) has indicated only that such homage existed until the year 1200.

" I incline to the view that if, against the will of England, the Treaty of Paris had re-established the suzerainty of the King of France over the Channel Islands, the Treaty of Calais would have extinguished that suzerainty. This view is supported by all the circumstances attendant upon the historical moment when the Treaty was concluded—already referred to above—as well as by the text of the Treaty of Calais itself.

" 9. *Other treaties.*—Subsequent treaties—the Treaty of Troyes of 1420, the ' Truce of London ' of 1471, the Treaties of Picquigny-Amiens of 1475, and of Étaples of 1492, as well as the commercial agreements of 1606 and 1665—have been analyzed by the Parties, who did not consider that any modification of the pre-existing situation resulted from the provisions of these treaties (Oral Arguments).

" It seems to me that further circumstantial evidence may be found in the Treaty of Troyes of 1420 in support of the construction placed on the older treaties. Article 22 of the Treaty of Troyes provided that when King Henry VI should become King of France, ' the Duchy of Normandy and also the other places and each of them " conquered by him in the Kingdom of France, should be under the jurisdiction of the Crown of France. This could not apply to the Channel Islands, because these had not been conquered by King Henry. Furthermore, it is a fact that shortly before that date France had been defeated by England, which then conquered Continental Normandy.

" It is nevertheless stated in the Counter-Memorial that: ' It may be said that the Treaty of Troyes annulled the Treaty of Calais and re-established the unity of the Kingdom of France ' (Part III, I, III). This would be a strong argument. But France has not relied upon it; she continued to invoke the Treaty of Calais (Rejoinder, Section I, I, C; Oral Arguments); she admitted that the argument was unsound. The Treaty of Troyes did not have this effect; the Channel Islands did not pass under the jurisdiction of the Crown of France. Why did they not do so? Because, as I have already pointed out, the Channel Islands had not been conquered by King Henry VI: they were already under English domination and remained thereunder.

" Accordingly, the occupation of the Channel Islands by England, which had been acknowledged and legalized, became definitive and incontestable. Attempts to retake them were renewed until the sixteenth century. But no effort was made to re-establish the suzerainty which had lapsed at the latest in 1360.

" 10. *Suzerainty alone.*—If the contentions of the French Government were admitted, what would have been the situation? At most the King of France would have had suzerainty over the islands occupied by England. Even if it were agreed that the homage due in respect of such suzerainty was not purely nominal but had been regularly rendered, could it be concluded that this suzerainty was transformed into sovereignty? The answer to this question is related to the demise of the feudal system.

" 11. *The transformation of suzerainty*—The feudal system disappeared slowly but by a continuous process. It disappeared gradually in certain countries and in certain regions without leaving any important traces in modern public law.

" In private law, when relations are involved between individuals or between a State and one of its nationals, it may be admitted that the fief did not disappear completely without leaving any trace, but rather became an emphyteusis, suzerainty having become eminent or direct domain, or sovereignty. We are here concerned with ascertaining the consequences of the disappearance of feudalism, of the fief, of suzerainty and vassalage, when the vassal, as in our particular case, was a king and the suzerain was another king.

" With particular reference to the Minquiers, the French Government has asserted that ' the feudal suzerainty of the King of France was *ipso facto* transformed into modern sovereignty '. (Oral Arguments.) Was the suzerainty of a king over another king transformed into sovereignty over the territory of the extinguished fief? Even when the fief was situated on the territory of the State of the vassal king? Even when the vassal king was a powerful enemy of the suzerain king? My reply is in the negative. In such a case the concept of national sovereignty destroys all the effects and traces of the former suzerainty. In such a case, when sovereignty is established, ' political feudalism ' disappears.

" How can it be argued that once any personal link which may have existed between the King of England and the King of France was severed, the latter should have obtained sovereignty over the soil of England ? How is it conceivable that, by the sole fact that suzerainty was abolished, the so-called vassal, the King of England, freed of all personal duties in respect of the King of France, should have lost to his former suzerain the attributes of the exercise of sovereignty over the Channel Islands, the competence to carry out administrative acts, collect dues and taxes, etc. ? How is it conceivable that all these attributes should be vested in the King of France ? Here again, my answer is in the negative. Even mere nominal homage which may have been owed by the Duke of Normandy to the King of France, and which I believe was never rendered in respect of the islands, could no longer be required, even if it had even been due. Even admitting that French suzerainty existed in respect of the Channel Islands belonging to the Dukes of Normandy, such suzerainty would have been completely abolished without leaving a trace.

" Even within the Kingdom, it was only by force of arms that the Kings of France, from Philip Augustus onwards, began to dominate the feudal lords and ultimately made them subject to their sovereign authority. Louis XI reduced a number of feudal lords to complete obedience. This was the reaction against the feudal lords. Military victory, and not the former suzerainty, became the title to domination.

" As regards Normandy, Philip Augustus conquered Continental Normandy and drove the English therefrom, by force of arms rather than by the execution of a judicial decision. But it has not been proved that Philip Augustus also conquered the Channel Islands: on the contrary, the treaties prove that these islands as a whole remained under English domination. In these islands, for more than a century, neither forfeiture nor the disppearance of feudalism, nor military victory, disturbed English domination, the union of the islands with England and the establishment of English sovereignty. The disappearance of feudalism removed the restriction which might hypothetically have attached to this domination.

" Furthermore, it must not be forgotten that ' vassals exercised all rights of sovereignty ' (Laurent, *La féodalité et l'Église*, p. 617).

" Accordingly, it is my view that while the French original title—which rested at most on an unproved and doubtful suzerainty said to have been accepted against the will of the vassal and not to have been respected by him—while this title was disappearing and becoming extinct, the English original title—resting on what was probably unconditional conquest by the Normans—was growing stronger, becoming consolidated, and finding a legal basis as a result of the successive treaties and the almost uninterrupted occupation of the Channel Islands as a whole, and, finally, of the assertion of national sovereignty when political feudalism disappeared.

" 12. *Geographical data.*—I accept the following observation of the French Government:

> ' The juridical analysis which a court has to undertake always involves a previous examination of the geographical data, in cases which raise the question of territorial competence. International

law attached very great importance to these factors in the Court's Judgment on the Norwegian Fisheries in 1951. . . . ' (Oral Arguments.)

" In its Rejoinder the French Government had already indicated the importance of this aspect of the present question:

> ' . . . . these islands, lying in a French bay, *which have become English* [italics supplied] because a French baron, a Duke of Normandy, conquered England in 1066. For in the ultimate analysis this is the somewhat piquant first cause of this trick of fate, which is completely at odds with the geographical data.'

" From this point of view, the source of the first observation is to be found in the very remote separation of certain of the islands from the Continent: Jersey is said to have been separated from the Continent perhaps in the year 709 (Oral Arguments). This consideration, which is based on a hypothesis, can obviously have no bearing on the present situation, whose origins are to be found in a period at least two centuries later. If the argument that ' the archipelago, taken as a whole, represents a dismemberment of the mainland ' (Oral Arguments) were to be taken into consideration, it might be contended that this whole now belongs to France. Likewise, another observation of the French Government, to the effect that the islands are situated in a bay bordered by French soil, does not appear in my view to contribute to a solution of the present dispute, because obviously most of the islands in that bay, or the more important of them, are under English sovereignty.

" There is, however, another observation which I regard as an interesting one: whilst stressing the fact that ' the archipelago, taken as a whole, represents a dismemberment of the mainland ' (Oral Arguments), the French Government asserts that ' the natural unity ' of the archipelago ' did exist before the thirteenth century ' and that ' at that period the chance of arms and the will of kings rent asunder what nature had joined together ' (Oral Arguments).

" Shortly before asserting this proposition, the French Government stated that the Channel Islands constitute a group of islands which seems to present a certain natural unity, so that it might be said that the State to which the principal islands belong should also possess sovereignty over the islands whose territorial status is uncertain (Oral Arguments).

" 13. *Natural unity.*—But the French Government does not agree that reference should be made to this ' natural unity ' after the thirteenth century. It claims to have acquired the Channel Islands through their incorporation ' as a whole ' in the Duchy of Normandy (Oral Arguments). At that period the islands formed a single complete whole with Normandy (Oral Arguments); later, in 1259, they are said to have been divided ' into two groups ' (Oral Arguments). ' A part of the archipelago ' was assigned to the King of France, ' another part ' to the King of England (Oral Arguments). We know one of these groups: it is still the Anglo-Norman archipelago. The other group is made up of the Chausey Islands, to which France claims that the Minquiers and the Ecrehos must be attached. The dismemberment of the Chausey from the archipelago has been admitted. I do not consider that this dismemberment involved the disappearance of the ' natural unity ' of the archipelago. The archipelago formed by all the other islands continued to exist. What it was necessary to prove was that the Minquiers and the Ecrehos were also detached at the same time as the Chausey or later, and once more attached to the Continent. It was necessary to invalidate the very reasonable presumption that they continued to be attached to the archipelago. In my opinion, the burden of proving this was on France, and France has not discharged this burden. The French Government claims that there has been a ' dismemberment . . . . of a great number of islands '—the Chausey group, Mont-Saint-Michel, Tombelaine, the island of Bréhat, ' to mention only a few of them ' (Oral Arguments), which became and remained French. No other islands, except Cezambre, are cited. They are certainly a part of the ' cluster of islands, islets and rocks ' to which reference has been made (Oral Arguments). All this does not, in my view, constitute ' a very large number of islands ', or even ' the greater part of the islands ' (Oral Arguments). These small islands may not even have been a part of the archipelago; or else they had already been detached from it, and continued to be so detached.

" History is said to have been at odds with geography. But if the dismemberment only involved the Chausey and even if it extended to other lesser islands, the archipelago would nevertheless have included and would still include almost all the islands, all the more important islands which are described in all maps and geography books as ' Anglo-Norman archipelago ' or ' Anglo-Norman islands ', or ' Channel Islands '. This archipelago, which still bears this name to-day, with its natural unity almost intact, is indisputably English.

" Any exceptions which historical facts may have made to this rule should be accepted restrictively. The United Kingdom acknowledges one exception: the Chausey. As regards the disputed islets in the present case, it was necessary to prove that they also constituted an exception. The evidence adduced points the other way.

" In my opinion, the French argument is based on an inversion of the ' geographical data ' when these are set out in the following terms: ' . . . their [the Ecrehos and the Minquiers] membership of an archipelago which the accidents of history alone have separated in part from France. . . . ' (Oral Arguments).

" In my opinion this constitutes a recognition that these islets were then a part of the archipelago, even though they may no longer be a part thereof to-day. But since the archipelago is detached from France, not partially but almost entirely (on the view that it was formerly attached to France), it has kept ' its natural unity ' and the Ecrehos and the Minquiers remain incorporated therein. The burden of proving that the Ecrehos and the Minquiers are no longer a part of the archipelago and that historical facts have detached them from the ' natural unity ' of the islands was on France. France has not discharged this burden; she considers that it was for the United Kingdom to provide direct evidence of its sovereignty over these two groups. It seems to me that it is for the Party interested in restricting the application of an established rule or of a recognized fact to prove that such a restriction is valid. In my opinion, the facts proved justify the presumption which I have stated above.

" The union of the islands with the Continent is a geological hypothesis having no further consequences. The union of the islands with Continental Normandy is a political fact, having no further consequences. But the unity of the archipelago continues to be recognized as an undisputed fact to-day.

" Just as a State which has occupied the coast or an important part of an island is deemed to have occupied the island as a whole, the occupation of the principal islands of an archipelago must also be deemed to include the occupation of islets and rocks in the same archipelago, which have not been actually occupied by another State.

" As has been noted in the Reply (para. 118), the 'natural unity' of the archipelago also explains the terms of a number of treaties and other instruments which mention a few of the principal islands in order to designate the archipelago as a whole. This method of referring to a whole by merely mentioning one of its parts is common procedure. The ' natural unity ' of the archipelago could not be broken and has not been broken; nor has it been disregarded.

" The mention of the principal islands was sufficient to designate the archipelago as a whole. But there have also been very frequent references to islands ' adjacent ' to other islands or lands indicated. An example of this may be found in respect of Jersey in the Treaty of Calais of 1360 (Annex A 2 to British Memorial). Likewise, in the fourteenth century, in an instrument confirming a Warden of the principal islands (Oral Arguments), in a Petition of the fifteenth century to Pope Sixtus IV (Memorial, para. 34), as well as in such modern documents as the Regulations of July 22nd, 1843 (Article XVIII), the Convention of January 2nd, 1859 (Article XVIII), the Convention of November 11th, 1867 (Article 38) and the Report of the French Experts of 1886.

" Reference was made to the ' islands of Jersey ' in a Grant of 1216 (Memorial, para. 5). Reference is made to ' Acrehowe. . . . de Iereseye ' in a Letter of Protection of 1337 (Annex A 17 to British Memorial). In respect of this document the French Agent has argued that the Latin word ' *de* ' must not be translated by the preposition ' of ' (*de*), but rather by the expression ' on behalf of ' (' *pour le compte de* '), ' concerning ' (' *au sujet de* ') (Oral Arguments), and he referred to the use of dictionaries. One of the best dictionaries, the one by Benoist and Goetzer, gives a considerable number of meanings for the word, including the meaning: ' *sur* ', ' *touchant* ', ' *quant à* ', ' *relativement* '. But the first meaning given, and the principal one, the most common one, is ' *de, hors de, venant de, issu de* '. And an explanation is given to the effect that the word ' expresses the fact that an object is separated from another to which it was attached ' (' *exprime qu'un objet est séparé d'un autre auquel il était rattaché* '). It is precisely in this sense that the expression was used in the words ' Acrehowe. . . . de Iereseye '. If any other meaning were attributed to the word, the phrase would be incomprehensible; it has moreover been shown that it was used at the same time with this meaning in other instances.

" The references to ' dependencies ' or ' adjacent islands ' are evidence that other islets or rocks were included in the designation of Jersey. It has not been proved that the Ecrehos and the Minquiers were so included, nor that they were excluded therefrom. But it is clear that it could only have been these islets and rocks to which allusion was made. This consideration corroborates the evidence which has been assembled and justifies the acts of occupation and administration which the Jersey authorities have exercised and still exercise on the Ecrehos and the Minquiers.

" The argument based on ' dependency ' has also been invoked by the French Government, which relies on the fact that the Minquiers are approximately equidistant from Jersey and the Chausey; the Minquiers are said to be a ' dependency ' of the Chausey. But this does not appear to be a valid argument, for in a Judgment of July 28th, 1772, the Council of the King of France designated by name the fifty-three islets included in the Chausey group; the Minquiers are not mentioned therein; nor are any of the Minquiers islets. (Gibon, pp. 294 *et sqq.*) Other documents and considerations support the conclusion deduced from this observation. The Ecrehos and the Minquiers were regarded as attached to Jersey and not to the Chausey. And this is an important consideration, because the Ecrehos and the Minquiers have rarely been designated individually; they are either included in the archipelago as a whole, or treated as a dependency of another principal island, i.e. Jersey.

" 14. *Proximity of the Continent.*—Apart from events of secondary importance, successive wars and the temporary military occupation of one or a number of islands, it may be said that history has not in fact been at odds with geography. My view is rather that historical facts have been influenced by the ' geographical data '; these facts have even confirmed a geographical criterion for the discrimination of the Channel Islands.

" This criterion was that of territorial proximity. The islands that were close to the Continent, the islands that were closest to the French coast, became French, not by reason of the very ancient geological fact that they were separated from the mainland (Oral Arguments), but as a necessary consequence of historical facts. The islands which were furthest removed from the coast remained English. This has been acknowledged by the French Government, when it said that in the thirteenth century the King of England did not retain other islands ' closer to the Continent ' (Counter-Memorial, Part III, I, I) and that after the Treaty of Calais, the King of France ' continues to remain the master of the islands *close to the coast,* which depend on it ' (Annex A 2 to British Memorial; Counter-Memorial, Part III, I III). The King is said to have kept ' a group of islands which are generally small. . . . close to the French coast ' (Oral Arguments). The French Government has not indicated what characterized the islands ' close to the coast ' or ' to the mainland '. It has not stated what distance from the coast constituted ' proximity '. It referred also to ' dependency '. . . . ' dependency on the coast '—which is rather vague. That Government has also stated, and rightly so, that ' the claim that the archipelago constituted a natural unity can only be given its full meaning by taking into consideration the proximity of the coast of the mainland '. (Oral Arguments.) But it has referred to no instrument or document in which the Minquiers or the Ecrehos were regarded as dependencies of the coast or of the Chausey. Of course, the proximity of the coast of the mainland must be taken into consideration, but the natural unity of the archipelago must also be considered at the same time. What we have here are two ' geographical data ' which complement each other. As is stated by the French Government itself (Oral Arguments), the Minquiers and the Ecrehos are closer to Jersey than to the mainland. They must be regarded as attached to Jersey rather than to the mainland. They must be included in the archipelago. These islets were, and continue to be, a part of its ' natural unity '. It is for this reason that they remained English, as did the archipelago itself.

" 15. *Historical facts.*—Moreover, the criterion of continental proximity is perfectly rational. I can readily understand why it has been adopted, or rather, why it has prevailed up to a certain point. It has not been the result of any abstract doctrinal trend, or of any preferred theory; it has resulted from historical events and from force of arms. After they had lost Continental Normandy and the islands of the Atlantic Ocean, the English were obliged to keep the Channel Islands in the interests of their own territorial defence. The conquest by Normandy in 1066 was a warning. England went even further, by keeping Aquitaine until the fifteenth century, seeking to re-conquer Continental Normandy and occupying it, at least in part, in the same period, for more than thirty years. It is clear that England has always shown the greatest interest in the Channel Islands. Counsel for the United Kingdom has stated—a fact which has not been challenged—that since 1204 these islands were not given in fee (save in two exceptional cases) but were governed by a Warden, who was an administrative official of the Crown. One of these exceptions is significant because, in 1254, a fief was granted to the King's son, who later became Edward I (Oral Arguments for September 21st, 1953; List of Wardens from 1204-1373, Annex A 158 to British Memorial). In 1226 the King proclaimed the autonomy of the Channel Islands, which is still in force at the present day, and granted them a charter of liberties (Memorial, para. 26). The autonomy of the islands is the political expression of the natural unity of the archipelago. And this unity had already been recognized by the declaration of the neutrality of the islands made by Louis XI and Pope Sixtus IV.

" The military victories of the English and their naval power allowed them to secure the domination of these islands generally. It seems inconceivable to me that England, having an important interest in the Channel Islands and full domination over the sea, and possessing all the principal islands, should not, without some special reason, have conquered and retained the Ecrehos and the Minquiers or, rather, that she should have left them to France. A principle of British policy was at stake: Great Britain claimed ownership of the sea which separated that country from France (Calvo, *Droit international public*, ed. 1896, I, pp. 473-476). This principle was rejected (Oral Arguments), and France objected ' to the Channel being called the " British Channel " '. This is quite true, and yet even the French continued to call the Channel Islands ' Anglo-Norman islands ' and even ' English islands '.

" 16. *The definitive situation.*—The principle of the limitation of territorial waters may have been questionable at that time, but the development of history has led to a situation which confirms that principle, perhaps by anticipation. The same consideration which prevented English domination of some of the islands which were definitively subject to the French domain might have prevented English domination over the Ecrehos and the Minquiers.

" But the determining cause which in my opinion explains the fact that England did not have domination over all the Channel Islands is the proximity of the French coast.

" The only islands which might be regarded as included in the Anglo-Norman archipelago and which were ' dismembered ' from the archipelago and placed under French domination, are the Chausey which are situated outside the strict belt of French territorial waters. But the Chausey are closer to the French mainland than all the other islands, even Alderney, which is indisputably English, and even the Ecrehos and the Minquiers. There was considerable alternation in the domination of the Chausey: one writer is alleged to have said that they ought to have remained English and the date of their definitive possession by France has been debated.

"The French Agent has cited other islands. The Mont-Saint-Michel is linked to the mainland; Tombelaine, according to French chart No. 1, is situated in the 'sands and rocks uncovering at law water'; Bréhat and Cezambre (cited in the Oral Arguments) are indisputably situated in French territorial waters. They could only be French. Like the Chausey they remained French. All the other islands are British, including therefore the Ecrehos and the Minquiers.

"17. *The grant of Piers des Préaux.*—There has been very learned argument upon the question whether the grant by Piers des Préaux was really in frankalmoin and whether, therefore, it extinguished the rights of the grantor. I do not consider it necessary to decide these questions. Whatever view one may have, the principal question is not whether Piers des Préaux retained his rights on the island, but simply whether or not the Duke of Normandy retained his. In its Rejoinder (Part I, Section I, II, A, 1°), the French Government has accepted the irrefutable rule that none may grant more than he possesses and that Government has acknowledged that the Duke retained his rights.

"It is true that the French Government goes on to say that the King of France succeeded the Duke, by the conquest of Normandy in 1204, and became the overlord of the Island of Ecrehos. This brings us back to another question which has already been dealt with and settled: the King of France was not the lord of the islands, the Judgment of 1202 did not relate to the islands. The conquest of Continental Normandy did not affect the situation in any way. There is no evidence to show that the conquest extended to the islands, or, in particular, to the Ecrehos and the Minquiers.

"There are certain other considerations to the same effect which I regard as relevant:

"(*a*) Piers des Préaux could not, without the consent of the lord, effect the dismemberment of a part of the islands which King John had granted him in fee. It matters little that the island of Ecrehos was of no value, as stated by the French Government. And it is easy to discern the importance of the grant if, as is alleged by the French Government, it had the effect of transferring to the King of France the ownership of the island which belonged to the King of England. In such circumstances the grant would have been a nullity.

"(*b*) In the 'acknowledgment of his fiefs' made by Piers des Préaux to King Philip of France after the surrender of Rouen in 1204, there is no reference to the Ecrehos (Oral Arguments).

"(*c*) Two years later, in 1206, the King of England restored to Piers des Préaux the lands which he held in England and he stated with regard to the islands that the King would 'do his pleasure' (Annex A 11 to British Memorial). There is no restriction resulting from the grant to the Abbey of Val-Richer.

"18. *Acts of occupation.*—The origin of the occupation of the islands by the English being clearly defined and the circumstances confirming that occupation being acknowledged, the acts carried out during this occupation, although they are scattered in time, bear witness to the continuity of that occupation and reflect the ' slow evolution ' of the process whereby sovereignty is established.

" I need only add a few complementary observations to the analysis given in the Judgment.

" 19. *Visits of fishermen.*—The most assiduous and most numerous visitors were fishermen. The French Government has said that after 1839 ' it allowed British fishermen to go peacefully to the Ecrehos and the Minquiers ' (Oral Arguments). The English Government has never permitted Frenchmen to frequent the islets.

" I quite agree that in certain cases, and in certain circumstances, the presence of private persons who are nationals of a given State may signify or entail occupation by that State. Sovereignty is exercised over persons who recognize that sovereignty. I have in mind the fact that the limits of the Portuguese and Spanish possessions in South America, which had been strictly laid down in the Treaty of Tordesilhas, were exceeded by persons from Brazil in search of gold and emeralds, and that, although these persons were frequently disappointed in their expectations and their ranks decimated by fever, they achieved the *uti possedetis* for Brazil and greatly increased her territory.

" Such individual actions are particularly important in respect of territories situated at the border of two countries which both claim sovereignty in that region.

" On the Ecrehos and the Minquiers, English fishermen have always been more numerous, much more numerous, than French fishermen. References to English houses on the islets are quite frequent and go back to ancient dates (Annexes A 51, A 54, A 61, A 64 to British Memorial). These persons came from Jersey and certainly from other islands close by. A further and more significant fact is that the French were pushed back by the English. And ' on several occasions ' the French Ministry of Marine stated it had ' requested our fishermen not to create incidents with the English fishermen. (Oral Arguments).

" But the most important consideration is not the mere going into the territorial waters of the Minquiers and the Ecrehos. The most important matter is the actual settling on the islets. But I consider that the French never remained there. The French Government has sought to explain this fact by referring to prevailing winds and currents (Oral Arguments). Whatever may have been the cause, the fact gives rise to certain consequences.

" An attempt has been made, without success, to show that the 1839 Convention gave the French ' not only a right to fish around the Minquiers and the Ecrehos, but also a right to go ashore on the islets and to settle there ' (Oral Arguments). But it has not been said that they landed there frequently, or even less, that they actually settled there in any numbers.

" 20. *Maps.*—It is necessary to say something on the evidence supplied by maps. I know that such evidence is not always decisive in the settlement of legal questions relating to territorial sovereignty. It may however constitute proof of the fact that the occupation or exercise of sovereignty was well known. The Parties have admitted this and have based certain contentions on documents of this kind. The United Kingdom Government has cited the map by Stieler, editions of 1905 and 1932, which show the disputed islets as British. The French Agent has submitted several other maps (Oral Arguments); some of these regard the Ecrehos as British but make no reference to the Minquiers. Still other maps omit both groups, or in some cases show the Ecrehos as falling outside the British zone. A searching and specialized study would be required in order to decide which of the contending views in respect of maps should prevail. At any rate, maps do not constitute a sufficiently important contribution to enable a decision to be based on them. I shall not take the evidence of maps into consideration.

" 21. *French protests.*—By fixing the ' critical date ' in the year 1839, and by stating that very few documents have come down from the Middles Ages by reason of the destruction of a substantial portion of the Norman archives (Oral Arguments) and that the more ancient documents have disappeared, that they were frequently very badly drafted, or may even never have existed at all, the French Government has sought to reduce considerably the volume of evidence upon which the Court may base its decision. Nevertheless, that same Government did not fail to consider acts subsequent to 1839, as the proceedings progressed, or to invoke them in support of its case. Such acts are much more numerous and more significant on the English side than on the French side. The French Government has invoked the protests which it made against several such acts. And since these protests were not made against the most important of these acts, the French Government has sought to explain this on the ground that the protests were solely directed against acts which did not signify an exercise of sovereignty because, according to its interpretation, both States were authorized to carry out such acts by the Convention of 1839. This interpretation has been rejected by the Court in its Judgment. There can consequently no longer be any excuse for the failure of the French Government to protest against the acts by which the British Government exercised sovereignty over the disputed islets. The French protests were even inadequate and ineffective in respect of British acts of another order. The words of the Permanent Court of International Justice in the Eastern Greenland case (p. 62) may be repeated here: the character of the acts of the British Government is not altered by the protests which, from time to time, were made by the French Government.

" In no case did the French protest produce as effective a result as that of the British Government in the case, mentioned in the Judgment, of the construction of a house on the Minquiers by a French national. As regards the Ecrehos, no protests were made after 1888 for sixty years. The French Government has sought to explain the absence of protests by relying on two grounds which must now be considered. According to the first, it was ' impossible ' for France to ' keep the United Kingdom Government continually under surveillance ' (Rejoinder, Part I, Section II, Sub-Section I). Such an impossibility is quite understandable, but that was not the question. All that was required of the French Government was that it should have kept the islets under surveillance, just as the British Government had done, a surveillance which had permitted the latter

Government, as I have already pointed out, to cause the construction of a house to be stopped immediately. Failure to exercise such surveillance and ignorance of what was going on on the islets indicate that France was not exercising sovereignty in that area.

" The second ground on which the French Government seeks to rely relates to the very important matter of the rating of houses on the Ecrehos by the Jersey authorities. The French Government has not chosen to apply to this matter the justification referred to above, and it has stated (Rejoinder, Part I, Section II, Sub-Section I): ' that these measures were carried out in Jersey and did not give rise to any important or overt act in the territory under dispute '. It might be said, according to the foregoing justification, that even if the payment of taxes had been carried out on the islets, the French Government would have been unaware of this fact because it was ' impossible for it to keep the United Kingdom Government continually under surveillance '. Indeed, the levying of taxes must necessarily have given rise to acts of authority on the islets themselves. But what is more important is the contrast between the attitude of the Jersey tax authorities and that of the French Government, or of some of its administrative departments, which never attempted to obtain any fiscal contribution from the disputed islets. They did not do so, nor—so far as I am aware—did they ever attempt to do so.

" The action of the British Government on the islets became more continuous and more intensive. The French Government then asks the Court: ' Should we, on our side, have resorted to force and war ? For this is not a negligible point in the period which runs from approximately 1875 to 1904. . . . The relations between our two countries were not what they are to-day. . . . Should we therefore have made a greater demand; should we have defied the British Government, and provoked a breaking off of relations because of the Minquiers and the Ecrehos ? It was sufficient to protest on paper. . . . '

" It is impossible to say too much in praise of the French Government for not having resorted to force and war, but if there were other more important disputes between the two countries, the same considerations which restrained the French Government should also have restrained the British Government, yet while the latter acted and continued to exercise its sovereignty, the French Government was satisfied to make a ' paper ' protest. Could it not have done anything else ? It could have, and it ought to have, unless I am mistaken, proposed arbitration; all the more so since the two States were bound by the Treaty of October 14th, 1903, which provided for the settlement by the Permanent Court of Arbitration of all legal disputes or disputes involving the interpretation of a treaty.

" The French Government has referred to the arbitral award in the Chamizal case and has cited the following passage: ' In private law, the interruption of prescription is effected by a suit but in dealings between nations this is, of course, impossible, unless and until an international tribunal is established for such purposes.' (Oral Arguments.) This award was made in 1911 and relates to facts in the period 1848-1895. At that time there was no international court. The award makes such a course contingent upon the existence of such a tribunal: ' *until* an international tribunal is established. . . . '. But such a tribunal has now been created and has existed for many years. Why did France not at least propose that the dispute should be referred to this tribunal, as England has done, after more than half a century of intermittent and fruitless discussion? The failure to make such a proposal deprives the claim of much of its force; it may even render it obsolete.

" Without dwelling on this matter, which in my opinion is obviously an important one, I consider that the action of the Court might easily be restricted or even nullified if disputes were allowed to be prolonged indefinitely without good reason and if an attempt were not made to obtain the Court's decisive intervention but preference were given to mere periodical and ineffectual ' paper ' protests. This state of affairs would be incompatible with the régime under which the rights of each State would be specified and guaranteed.

" 22. *Two further pieces of evidence.*—The position which was achieved in the second half of the nineteenth century became definitive. It has been very well described by two famous Frenchmen.

" The first of these is Victor Hugo. The French Government has cited his novel *Les Travailleurs de la Mer*, written around 1866, when Victor Hugo lived at Guernsey. In the introduction to this book the following words also deserve to be quoted, and I have myself italicized some of them: ' The Channel Islands are pieces of France that have fallen into the sea and *have been gathered up by England*' (p. XXI). ' The *archipelago* is made up of four islands . . . . *without mentioning the islets*' (p. XXI). ' Facing France, the indentation of the Jersey coast at St. Aubin seems like the *opening of a hive towards which* these two scattered but separate groups, the Grelets and *the Minquiers, appear to swarm*' (p. XXV). Hugo noted that the local population were Normans and that they had not forgotten that it was Normandy that had conquered England. He might have said that there was no English domination but rather union with England. He also pointed out that the English called the archipelago the ' Norman islands ' and that the French called them ' English islands ' and Hugo himself called them ' îles de la Manche ' or, in English, ' Channel Islands '.

" The other piece of evidence is supplied by the famous geographer, Élisée Reclus. I shall take the liberty of changing the order of the words in his proposition (*Nouvelle Géographie universelle*, ed. 1881, Vol. II, p. 639), without altering their meaning, using the same words as he did, some of which I have italicized: ' Jersey, Guernsey, Alderney and *neighbouring archipelagos* ', those lands which ' the English call the *Channel Islands* ', belong ' politically to Great Britain ' although they are ' a natural dependency of French Normandy '.

" 23. *Conclusion.*—I should like to add two clarifications to the operative clause of the Judgment.

" The first relates to the possibility of appropriating the islets: I would refer to ' present or future appropriation '. The extent to which the rocks are ' capable ' of appropriation is unspecified and the Court cannot determine this point. It is a matter which cannot be fixed in advance. Who could have foreseen in the not too distant past that France would some day plan to utilize tidal power at the Minquiers for the production of electrical energy?

" The purpose of the second clarification is to safeguard:

" (*a*) The exercise of fishery rights in the waters of the Ecrehos and the

Minquiers, in accordance with the Agreement of January 30th, 1951 (Annex A 23 to British Memorial), signed by the representatives of France and the United Kingdom and negotiated by them at the same time as the Special Agreement of [December] 29th, 1950. The present Judgment in no way affects that Agreement.

"(*b*) The possibility of English co-operation in carrying out the French Government's project for the production of electrical energy by means of works in the Minquiers region, in accordance with the declaration made by the British representative with the authorization of his Government (Oral Arguments). I am willing to believe that no judge nowadays can blindly follow the obsolete rule *fiat justitia, pereat mundus* (Ripert, *La règle morale dans les Obligations civiles, passim*). Still less can we be bound by such a rule in the field of international law whose principles, as it has been said, may represent the consecration of the former natural law. And I would have been pleased to place on record the generous declarations of the representative of the British Government."

iii.—Cession. Plebiscite

Cession—Duty to Maintain Order in Ceded Territory Still Administered by Ceding State—Nationality and Allegiance of Inhabitants —Territorial and Extra-Territorial Jurisdiction—Jurisdiction over Nationals in Ceded Territory—The Law of India.

GUDDER SINGH AND ANOTHER *v.* THE STATE.

India, High Court of Punjab (*Criminal Appellate*). *August* 12, 1953.
(Falshaw and Kapur JJ.)

THE FACTS.—As a result of the Radcliffe Award, which made certain adjustments in the boundary between Pakistan and India, two villages, Jalloke and Mito Jagir, came within the territory of Pakistan although previously they had been in that of India. After the transfer of these villages to Pakistan they continued, nevertheless, to be administered by India as the result of an agreement between the Governments of the Punjab (India) and Punjab (Pakistan). Land in these two villages was allotted to Indian citizens and the villagers were supplied with arms under the Indian Border Defence Scheme. For administrative purposes these villages were made part of Ferozepore Tehsil, India, and the residents were called upon to pay land revenue to the Indian Punjab authorities. As a result of the refusal of the villagers to comply with this order the police were despatched to remove the arms from the villagers which had been supplied under the Defence Scheme, but the inhabitants resisted the authorities and in consequence lives were lost in the affray. One Sub-Inspector of Police was killed and six of the villagers were charged with his murder, two of them being convicted. This appeal, by these two, was from the order of the Third Additional Sessions Judge of Ferozepore, dated March 11, 1953, convicting the appellants. The appellants contended, *inter* *alia*: (1) that the Indian authorities had no right to enter Pakistani territory and that the villagers were entitled, if not obliged, to resist them, (2) that the revenue laws of India could not apply to Pakistani territory and hence that the exaction of the land revenue was illegal and this entitled the villagers to resist its collection and to prevent, if they could, the removal of arms supplied to them since this removal was admitted to be a consequence of their failure to pay the revenue, (3) that the crimes which they were accused of committing had arisen, if at all, in Pakistani territory, and therefore the Courts of India had no jurisdiction over them, and (4) that these crimes were connected with the collection of Indian revenue in Pakistani territory and hence were not subject to the jurisdiction of the Indian Courts.

Held: that the appeals must be dismissed. (1) The appellants were British Indian subjects and after the partition they became subjects of the Indian Dominion and hence the Courts of India had jurisdiction over them, according to the law of India. (2) One of the principles of international law is that a State in possession must maintain a certain order and safeguard economic conditions in the territory of which it is in possession. (3) If possession of territory which has acceded to another State remains in the possession of the ceding State, the laws which were originally in force would continue in force there and can be enforced by the State in possession. Thus the revenue laws of the ceded territory are not necessarily affected by the change in the nationality of the territory.

Kapur J. said, in part: " The villages of Jalloke and Mito Jagir have under the Radcliffe Award come into the territory of Pakistan but by an agreement between the Financial Commissioners of the Punjab (India) and Punjab (Pakistan) these two villages were administered by India. For administration purposes these two villages have been made parts of Ferozepore Tehsil and it appears that the lands of these villages were allotted to Indian Nationals who either owned land in these villages or had come from Pakistan.

". . . On the 26th of February 1952, the Ministry of External Affairs issued a notification No. S.R.O. 369 which gave retrospective effect as from the first day of April 1951, and applied all laws in force in the districts of Amritsar, Ferozepore and Gurdaspur to all border areas of those districts. . . . This notification provided:

> ' 1. All laws for the time being in force in the Amritsar, Ferozepur and Gurdaspur Districts of Punjab, shall be, and shall, as from the first day of April 1951, be deemed to have been, in force, respectively, in the Amritsar border areas, Ferozepur border areas, and Gurdaspur border areas as specified in the Schedule to this Order.
>
> Provided that in the laws so applied any reference to India or a State shall be construed as a reference to, or as including a reference to, the said areas:
>
> Provided further that for the purpose of facilitating the application of the said laws, any court having jurisdiction in, or in relation to,

the said areas may construe the provisions thereof with such alterations not affecting the substance as may be necessary or proper in the circumstances. . . .'

" The question of jurisdiction has again been raised by counsel for the appellants. Mr. Sodhi submitted that the offence, if any, was committed in April, 1951. At that time the Indian Union had no jurisdiction to enforce its laws and, therefore, if servants of the Indian Union went to enforce the payment of land revenue they were doing something which was illegal and the villagers of Jalloke had a right to oppose a forcible exaction of land revenue from them. This argument is put forward as a defence, the submission being that if on the date when this murder is alleged to have been committed the Government had no right to get any revenue from them and attempt was made to forcibly realise it even if death was caused by the villagers in preventing this illegal realisation, the offence is not one of murder. The appellants were British Indian subjects of the Indian Dominion and according to section 188, Criminal Procedure Code, when a British subject domiciled in India commits any offence at any place without and beyond the limits of the Provinces the Courts in India have jurisdiction to try such offence as if it had been committed within the Provinces of India. Therefore, even before any notification was issued under Act XLVII of 1947, the Courts in India had jurisdiction to try the present case.

" It is true that Jalloke had fallen into Pakistan territory but the inhabitants of Jalloke had accepted Indian nationality and the protection of the Indian Union. They had been given rifles under the Border Defence Scheme and it cannot be said that they would not be amenable to the jurisdiction of Indian Courts for offences in the territory of Jalloke. I may also say that at no stage was it ever submitted that the accused persons were not citizens of India.

" Under section 3 of the Extra-Provincial Jurisdiction Act, 1947, it is provided that the Central Government is lawfully authorized to exercise extra-provincial jurisdiction in such manner as it thinks fit. Under section 4 the Central Government has the power to make orders, and section 5 validates any acts done in pursuance of such extra-provincial jurisdiction, but apart from this the territory in which the Village of Jalloke is situate had remained by agreement between India and Pakistan within the administrative jurisdiction of India and one of the principles of international law is that a State in possession must maintain a certain order in the territory of which it is in possession; see Oppenheim's *International Law*, Volume I, p. 514.

" If the possession of territory which acceded to another State remains in the possession of the ceding State, the laws which were originally in force should still be in force and can be enforced by the State in possession. At page 396 of Hyde's *International Law*, Volume I, it is stated: ' After the conclusion of a treaty or cession and pending the actual transfer of possession to the grantee the grantor is doubtless permitted to exercise authority necessary to maintain order and safeguard economic conditions within the territory concerned ', and at page 399 it is stated that the revenue laws of the ceded territory are not affected by the change of territory. Thus whether the principle of agreement between the two States applies or the territory remained in the possession of India although by [the] Radcliffe Award it had fallen into the Dominion of Pakistan, according to the statement of law in Hyde the authority to maintain order and safeguard economic conditions was vested in India. In whichever way we look at it, whether the territory had become Pakistan territory and by consent of the parties it remained in [the] possession of India or after the cession of the territory to Pakistan it remained in possession of India, the right of India as a State to maintain order and safeguard economic conditions remained in that State unimpaired.

" And even if the territory has been absorbed by India the position in International Law is: ' There is also a genuine succession with regard to the fiscal property and fiscal funds of the extinct State. They both accrue to the absorbing State *ipso facto* by the absorption of the extinct State.' (Oppenheim's *International Law*, Vol. I, p. 154.)

" In my view, therefore, there was no substance in the question of jurisdiction . . . ."

With this judgment Falshaw J. concurred.

[Report: I.L.R. [1954] VII Punjab 649.]

v.—Conquest and Annexation

Annexation—Non-recognition of—Effects of—Non-recognition by United States of Annexation of Lithuania by Soviet Russia.

See p. 193 (*Latvian State Cargo and Passenger Steamship Line et Al.* v. *United States*).

VI.—International Leases and Grants in Perpetuity

State Territory—Rights in Foreign Territory—Effect of Bases Agreement Giving United States Jurisdiction over Philippine Nationals Employed at American Bases in the Philippines—Primary Jurisdiction—Rights of Individuals under the Agreement.

THE PEOPLE OF THE PHILIPPINES *v.* SEGUNDO M. ACIERTO.

Philippines, Supreme Court. January 30, 1953.

THE FACTS.—While employed as a court reporter by the United States at Camp Rizal, Quezon City, Philippines, the defendant claimed and received compensation for services not rendered. On April 7, 1948, he was tried by court-martial as a person serving with the United States Army,[1] notwithstanding his plea that he was not subject to the jurisdiction of a United States court-martial. He was found guilty and sentenced to life imprisonment. The trial of Philippine nationals by United States military courts was permitted in certain specified circumstances by the Bases Agreement[2] between the two States, the pertinent portion of which is quoted, *infra*, in the opinion of the Court.

Upon review of the case by the Commanding General, Philippine-Ryukyus Command, the sentence was quashed for lack of jurisdiction. On June 19, 1948, the appellant was turned over to the Philippine civil authorities, by whom he was then put on trial for the offences of falsification of a private document and *estafa* (fraud). The appellant objected to the trial on the grounds that the Philippine court lacked jurisdiction, that he was being subjected to double jeopardy, and that the requirement concerning notification in Article XIII, paragraph 3, of the Bases Agreement had not been complied with. At the trial, the Staff Judge Advocate of the Philippine-Ryukyus Command of the United States Army appeared as *amicus curiae* and submitted a memorandum stating that the appellant had not been subject to trial by court-martial under the provisions of United States military law. The evidence indicated that the defendant prepared the reports of proceedings in courts-martial on a piece-work basis, when he desired to work, and that he was not a regular salaried employee. The defendant was convicted, and appealed.

Held: that the conviction must be affirmed. The disclaimer of jurisdiction by the United States made the question whether the court-martial had jurisdiction immaterial. Under the Bases Agreement the jurisdiction of the United States was prior or preferential, but not exclusive. Philippine courts could thus exercise jurisdiction over offences committed on military bases whenever the United States declined to exercise its jurisdiction. The defendant, in any event, had no right to invoke the provisions of the Agreement, since the rights granted therein inured only to the benefit of the States parties thereto. The Court said: " The Bases Agreement between the Republic of the Philippines and the United States over American

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[1] Trial by court-martial of " persons accompanying or serving with the Armies of the United States in the field " was authorized by Article of War 2 (*d*), which was in force at the time: 41 United States Statutes at Large 787 (1920).

[2] Agreement between the Philippines and United States of America concerning Military Bases, signed at Manila, March 14, 1947: 61 United States Statutes at Large 4019, T.I.A.S. 1775; *U.N.T.S.*, 43 (1949), p. 271.

Military Bases signed on March 14, 1947, and effective upon its acceptance by the two Governments, in part provides:

> ARTICLE XIII
>
> JURISDICTION
>
> ' 1. The Philippines consents that the United States shall have the right to exercise jurisdiction over the following offenses:
>
> ' (*a*) Any offense committed by any person within any base except where the offender and offended parties are both Philippine citizens (not members of the armed forces of the United States on active duty) or the offense is against the security of the Philippines;
>
> ' (*b*) Any offense committed outside the bases by any member of the armed forces of the United States in which the offended party is also a member of the armed forces of the United States; and
>
> ' (*c*) Any offense committed outside the bases by any member of the armed forces of the United States against the security of the United States.
>
> ' 2. The Philippines shall have the right to exercise jurisdiction over all other offences committed outside the bases by any member of the armed forces of the United States.
>
> ' 3. Whenever for special reasons the United States may desire not to exercise the jurisdiction reserved to it in paragraphs 1 and 6 of this Article, the officer holding the offender in custody shall so notify the fiscal (prosecuting attorney) of the city or province in which the offense has been committed within ten days after his arrest, and in such a case the Philippines shall exercise jurisdiction.'

" Camp Rizal where the crimes in question were committed was, it is conceded, a military base or installation in 1948. Since paragraphs (*b*) and (*c*) of section 1 refer to offenses ' committed outside the bases ' by members of the armed forces, and since the accused was not, it is also conceded, a member of the armed forces, these paragraphs may be eliminated from our inquiry into the jurisdiction of the court martial.

" Paragraph (*a*) is the provision in virtue of which the appellant disputes the authority of the civil court to take jurisdiction of his offenses. He contends that he was an employee of the Army of the United States, and was properly and legally tried by a duly constituted military court.

" This is the exact reverse of the position defendant took at the military trial. As stated, he there attacked the court martial's jurisdiction with the same vigor that he now says the court martial did have jurisdiction; and thanks to his objections, so we incline to believe, the Commanding General, upon consultation with, and the recommendation of, the Judge Advocate General in Washington, disapproved the court martial proceedings.

" The question that meets us at the threshold is: Was the defendant an employee of the United States Army within the meaning of the United States Military law? . . . " [The Court concluded, after an examination of United States military law and a consideration of the views of the Judge Advocate General of the United States Army, that the defendant was not subject to United States military law.]

" . . . When such construction is a disclaimer of jurisdiction under the Bases Agreement, the Philippine Government certainly is not the party to dispute it; the fewer the rights asserted by the United States the more is enhanced the dignity of the Philippines and its interest promoted.

" Irrespective of the correctness of the views of the Military authorities, the defendant was estopped from demurring to the Philippine court's jurisdiction and pleading double jeopardy on the strength of his trial by the court martial. A party will not be allowed to make a mockery of justice by taking inconsistent positions which if allowed would result in brazen deception. It is trifling with the courts, contrary to the elementary principles of right dealing and good faith, for an accused to tell one court that it lacks authority to try him and, after he has succeeded in his efforts, to tell the court to which he has been turned over that the first has committed error in yielding to his plea.

" From another angle, it seems immaterial whether or not the court martial had jurisdiction of the accused and his crime under the terms of the Bases Agreement. Granting that it had, the Court of First Instance of Quezon City nevertheless properly and legally took cognizance of the cases and denied the defendant's motion to quash.

" By the Agreement, it should be noted, the Philippine Government merely consents that the United States exercise jurisdiction in certain cases. This consent was given purely as a matter of comity, courtesy, or expediency. The Philippine Government has not abdicated its sovereignty over the bases as part of the Philippine territory or divested itself completely of jurisdiction over offenses committed therein. Under the terms of the treaty, the United States Government has prior or preferential but not exclusive jurisdiction of such offenses. The Philippine Government retains not only jurisdictional rights not granted, but also all such ceded rights as the United States Military authorities for reasons of their own decline to make use of. The first proposition is implied from the fact of Philippine sovereignty over the bases; the second from the express provisions of the treaty. The treaty expressly stipulates that offenses included therein may be tried by the proper Philippine courts if for any special reason the United States waives its jurisdiction over them.

" The carrying out of the provisions of the Bases Agreement is the concern of the contracting parties alone. Whether, therefore, a given case which by the treaty comes within the United States jurisdiction should be transferred to the Philippine authorities is a matter about which the accused has nothing to do or say. In other words, the rights granted to the United States by the treaty inure solely to that country and can not be raised by the offender. (*Funk* vs. *State*, 208 S. W., 509.) By the same token, noncompliance with any of the conditions imposed on the United States can not benefit the offender.

" This brings up the last ground for the contention that the Court of First Instance of Quezon City was without jurisdiction of the cases at bar. The Bases Agreement provides in Article XIII, paragraph 3, that in case the United States renounce the jurisdiction reserved to it in paragraphs 1 and 6 of this Article, the officer holding the offender in custody shall so notify the fiscal of the city or province in which the offense has been committed within 10 days after his arrest. The Solicitor General invites attention to the fact that ' appellant was arrested by the United States Army on March 20, 1948, and confined until June 18, 1948, pending final decision of this case,' and like the appellant, he believes that ' this delay of three months does not obviously comply with the requirement of the foregoing section, which is explicit on its terms and provides for no exception.' In their opinion this delay was fatal.

" The appellant and the Solicitor General labor, we believe, under a misapprehension as to the purpose and meaning of the treaty provision just cited. This provision is not, and can not on principle or authority be construed as a limitation upon the rights of the Philippine Government. If anything, it is an emphatic recognition and reaffirmation of Philippine sovereignty over the bases and of the truth that all jurisdictional rights granted to the United States and not exercised by the latter are reserved by the Philippines for itself.

" The ten-day requirement is of directory character relating to procedure, inserted merely for the convenience of the Philippine Government. It can not and does not pretend to diminish or impair the fundamental rights of jurisdiction reserved by the treaty for this Government. It is an obligation imposed on the United States precisely with a view to enabling the Philippine Government the better to exercise its residual authority. The offender has no interest in this clause of the treaty beyond the right to demand that whoever is to try him should proceed with reasonable dispatch. To say that failure on the part of the United States to turn the offender over to the Philippine authorities within ten days works as a forfeiture of the Philippine Government's jurisdiction is a paradox. By the appellant's and the Solicitor General's theory, this Government would be penalized by the fault of the other signatory to the treaty over whose action it has no control. In effect, the idea is not much unlike divesting a lender of the ownership to his property by reason of the borrower's neglect to return it within the time promised. What is more serious, offenses not purely military in character perpetrated in military or naval reservations would be left unpunished where the military or naval authorities in appropriate cases fail or refuse to act."

[Report: Off. Gaz. 49 (1953) 518.]

VII.—Sovereignty Over the Air

Sovereignty over the Air—Smuggling—Moment of Entry when Goods Brought by Air—The Law of Israel.

SILBERWACHT *v.* ATTORNEY-GENERAL.

Israel, District Court of Tel-Aviv. January 18, 1953.

THE FACTS.—This was an appeal from a decision of the Magistrate's Court convicting the appellant of smuggling and of being in possession of smuggled goods. The appellant was employed at Lydda Airport where there existed a clandestine organization for purchasing tinned food from South African airmen and bringing it on to the market without customs examination and payment of customs duty. By s. 2 of the Customs Ordinance smuggling is defined as:

> "Any importation, exportation, carriage coastwise or over the land frontiers, or attempted importation, exportation, carriage coastwise or over the land frontiers, of goods, with intent to defraud the revenue or to evade any prohibition of, restriction on, or regulations as to, the importation, exportation, carriage coastwise or over the land frontiers of any goods; and 'smuggle' and 'smuggled goods' have corresponding meanings."

One of the grounds of appeal was that when the tins were removed from the aircraft by the aircrew they had already been smuggled by the South African crew and were therefore smuggled goods, so that the appellant could not be convicted of smuggling.

Held: that the appeal must be admitted and the conviction dismissed.

The majority of the Court said (*per* Malchi J.): "This ground of appeal raises several important questions of public international law . . . The question whether the removal of the goods from the aircraft (which, it seems, was a South African aircraft, although it is not clear whether it was privately owned or a State aircraft) constitutes their importation into Israel, or whether the goods entered Israel at the moment when the aircraft entered Israel, is connected with the question whether an aircraft has to be regarded as foreign territory. Although the rule is nowhere explicitly laid down, it seems that the law of Israel presupposes that the law governing territorial sovereignty (from the point of view of jurisdiction) is similar to the concept of ownership of land, and includes authority not only over the surface of the land but also down to its depth and also in the skies above *jusque ad coelum.* The general opinion in public international law is similar. See Article I of the Chicago Air Agreement of 1944 . . .

" It also seems that this supposition regarding the extent of sovereignty in the air has formed the basis for many international air conventions, whose provisions have been given validity in the municipal law of Israel by virtue of Orders-in-Council issued under powers conferred by the Air Navigation Act, 1920, which is still in force in Israel despite the fact that in 1949, after the date of the establishment of the State of Israel, it was repealed and replaced in England. According to the different Orders-in-Council, the crews of foreign aircraft are permitted to transport in their aircraft goods in transit, and although such goods are exempt from customs, the aircraft themselves are not immune from control by the authorities of the State in which the aerodrome is situated.

" Since for certain limited purposes the law of the air has developed to some extent parallel with the law of the sea and for some purposes aircraft are subject to a legal régime similar to that of sea-going vessels, there has grown up a more general theory concerning this parallelism. The better opinion, however, denies the validity of any such theory. See Shawcross and Beaumont on *Air Law*, 2nd edition (1951), pp. 17, 86-88. It seems that counsel for the prosecution has based himself on this erroneous theory in trying to apply to this aircraft analogies taken from the sea. However, even if we were to accept this theory, we could not agree that the aircraft is to be regarded as ' foreign territory ', and this for the following reasons. It has always been an accepted principle of international law that the concept of ' the law of the flag ' applies in regard to jurisdiction over what occurs in a ship. That is to say, the State whose flag a ship flies and in which the vessel is registered, is entitled to try offenders against that State's laws for acts done on board even when the vessel is within the territorial waters of another State. From this starting point a further question arises, namely: Is the State within whose territorial waters the ship has anchored, entitled to try persons on a foreign vessel for offences which they committed on board that ship ? To word it differently, is the vessel considered as foreign territory when she is lying in the territorial waters of another State ?

" On this point the opinions of the writers on international law are divided. It is not within our province to decide which view is correct. In *Shimshon* v. *Attorney-General* (*International Law Reports*, 1950, Case No. 19) and in *Steinberg* v. *Attorney General* (*ibid.*, 1951, Case No. 4) the Supreme Court laid down that public international law in itself is not inherently part of the municipal law of Israel, but that parts of public international law have been received into the English Common Law as an integral part thereof, and those parts are now incorporated in the law of Israel through the channels of Article 46 of the Palestine Order-in-Council, 1922, and section 11 of the Law and Administration Ordinance, 1948.

" This problem was considered by the Judicial Committee of the Privy Council in London, on appeal from the Supreme Court of Hong Kong, in *Chung Chi Cheung* v. *The King* (see *Annual Digest*, 1938-1940, Case No. 87). The accused had been suspected of an offence committed on board a ship belonging to the Chinese Government which had come to rest in the territorial waters of Hong Kong, where he had been arrested, tried and convicted. The Government of China was entitled to try the man for an offence committed under its flag but it was not interested in so doing and raised no objection to the action of the British authorities. In the Privy Council the discussion centred on the contradictory theories prevalent in international law. Oppenheim starts from the assumption that, from the point of view of international law, a vessel is to be regarded as foreign territory, a sort of floating island. On the other hand, counsel for the accused relied upon the views of Brierly, who points out that the floating island theory is a pure fiction by which it is implied that the flag State is entitled to try the offender *as if* the act had been committed within its territory although in fact the act has been committed within the territorial waters of the coastal State—a fact to which international law does not close its eyes. The jurisdictional power of the flag State is parallel and not exclusive. It results therefore that the coastal State is not prevented from trying the accused since a foreign ship within its territory is not foreign territory. Brierly's opinion prevailed, and the Privy Council advised accordingly.

" To return to the matter before us, the result will be that even if South Africa has jurisdiction over acts performed in her aircraft in accordance with South African laws regarding the air and regarding jurisdiction (assuming that the existence of exterritorial laws of that character is not contrary to international law and the public policy of Israel)—nevertheless the foreign aricraft is not foreign territory. The result, therefore, is that the act of smuggling came to an end when the pilot imported the tins into Israel with the intention of defrauding the customs. The act of smuggling did not commence at the moment when the tins were removed from the aircraft, since they were already within Israel. [The Judge here pointed out that if the offence of smuggling takes place in time of war, then by s. 210 (3) of the Customs Ordinance it is liable to attract a more severe penalty. On this he said:] The prosecution would then have to prove that Israel is in a state of war. To declare war and to decide that the state of war is persisting, is a matter exclusively for the Executive. No official notice regarding a state of war has been published, although there have been official notices to the effect that a state of emergency exists in Israel. It is not essential that such notices should be made public. According to the principle of act of State, the Court will decide that such a state of affairs exists when there is brought before it a certificate signed by a Minister of State . . . As a result, neither this Court nor the Court below could or should reach the conclusion that Israel is still in a state of war . . . "

Judge Avissar, dissenting, said: " As to the smuggling, it seems to me to make no difference to the appellant whether the pilot who landed at Lydda airport with the tinned goods on board and intending to smuggle them was guilty of an offence or not . . . When the appellant received the goods from the aircraft and removed them from Lydda Airport without paying customs—as has been proved to have occurred—he committed the offence. The position of a person who receives goods from an aircraft at an airport cannot be any different from the position of a person who receives goods from a ship within the territorial waters of the country and imports them by smuggling. At all events, such a person is to be considered as an importer in the sense of the definition of smuggling contained in section 2 of the Customs Ordinance; and why should any discrimination be made in favour of the man who commits the smuggling by receiving the goods from an aircraft which has landed at an airport ? . . . "

[Report: *Pesakim Mehoziim*, vol. 9 (1954), p. 75.]

i.—Air Navigation Conventions

Air Law—International Air Law Conventions—Warsaw Convention of 1929 on International Carriage by Air—Meaning of " International Carriage " of Goods by Air—Successive Carriers—Liability under Warsaw Convention for Loss of Goods—Whether Court May Entertain Action against Carrier Incorporated Abroad—Carriage of Goods by Air Act, 1932.

ROTTERDAMSCHE BANK N.V. AND ANOTHER *v.* BRITISH OVERSEAS AIRWAYS CORPORATION AND ANOTHER.

England, Queen's Bench Division (Commercial List).
(Pilcher J.)
February 18, 1953.

THE FACTS.—The two plaintiffs were the Rotterdamsche Bank, a Dutch corporation, and the Banque de Indochine of Djibouti in French Somaliland, a French corporation. The first defendants, British Overseas Airways, were a British corporation, and the second defendants, Aden Airways Ld., were a limited company registered under the Indian Companies Act, which was applicable in Aden; in fact they were a wholly owned subsidiary of the first defendants.

The first plaintiffs had delivered to K.L.M., a Dutch airline, a case of 2,000 gold sovereigns for carriage by air from Amsterdam to Djibouti, and for delivery there to the second plaintiffs, upon the terms of an air consignment note, the first plaintiffs being the named consignors and the second plaintiffs the named consignees. The air consignment note provided that the goods were to be carried in the following manner: by K.L.M. on Service K.L.829 from Amsterdam to Cairo on March 25, 1950; thence on service B.O.471 from Cairo to Asmara on March 28, and again on service B.O.477 from Asmara to Djibouti on March 29. The goods were duly carried by K.L.M. from Amsterdam to Cairo, and there they were loaded on to an aircraft of the second defendants. The goods should have been transhipped again at Asmara, but owing to some negligence or oversight they were left on board the aircraft and carried to Aden, where they disappeared. In the result they were never delivered to Djibouti.

A writ was issued against the defendants, and leave to serve Aden Airways Ld. out of the jurisdiction was granted. Aden Airways Ld. entered a conditional appearance, then took out a summons to set aside the writ and all subsequent proceedings against them on the ground that the Court had no jurisdiction to entertain the plaintiff's claim against them.

The Warsaw Convention of 1929 provides:

> " Art. 28 (1). An action for damages must be brought at the option of the plaintiff in the territory of one of the High Contracting Parties, either before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the court having jurisdiction at the place of destination."
>
> " Art. 30 (1). In the case of carriage to be performed by various successive carriers of article 1, each carrier who accepts passengers, luggage or goods is subjected to the rules set out in this Convention, and is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision."

Held: that the writ and all subsequent proceedings against the second defendant must be set aside. The contractual carriage from Amsterdam to Djibouti was an international carriage by air, subject to the provisions of the Carriage by Air Act, 1932, which made applicable the terms of the Warsaw Convention of 1929. Art. 30 (1) of the Convention provided the necessary contractual link between the plaintiffs and the second defendants in respect of that part of the carriage performed by the second defendants. But since the second defendants were ordinarily resident at Aden, they could only be sued, pursuant to Art. 28 (1) of the Convention, either at Aden or at Djibouti, *viz.*, the contractual place of destination of the goods. Therefore the Court had no jurisdiction to entertain the claim against them.

Pilcher J., after stating the facts, continued: " The air consignment note, which constituted the contract of carriage, was between the K.L.M. Company and the first plaintiffs. The carriage as described in the consignment note was, on the face of it, an 'international carriage' and thus subject to the provisions of the Carriage by Air Act, 1932, which gives effect to the Warsaw Convention for the unification of certain rules relating to the international carriage by air. The Convention itself is scheduled to the Act. Section 1 of the Act of 1932 provides that the provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, consignors and consignees, have the force of law in the United Kingdom in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the carriage. Section 3 provides that Her Majesty may by Order in Council apply the provisions of the Act to any colony. I understand that appropriate action has been taken under this section to apply the provisions of the Act to the Colony of Aden. France and Holland are both signatories to the Convention.

" One of the principal issues between the parties was whether the goods were in fact at the material time on an 'international carriage' and thus subject to the Convention. To render this judgment intelligible it is necessary that I should first set out the material articles of the Convention. [His Lordship then recited Arts. 1, 5 (1), 8, 11 (1), 18 (1), 22 (2), 23, 25 (1), 28 (1), 29 (1), 30, 32, and 33 of the Convention. He continued:] " While the contract of carriage made in the air consignment note was on the face of it between the first plaintiffs and the K.L.M. Company, Article 30 (1) makes it clear that where international air carriage is undertaken by successive carriers, as in this case, each carrier who accepts goods is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

" Accordingly, it would seem on one reading of the air consignment note that British Overseas Airways Corporation were contractually bound under the terms of the Convention to perform their part of the contract of carriage evidenced by the air consignment note, namely, from Cairo to Djibouti. No mention, however, was made in this document of the second defendants, and these defendants were a separate legal entity. The plaintiffs contended that the second defendants were not contractually bound in any fashion, and that the portion of the air carriage conducted by them was not subject to the terms of the Convention. They pointed out that the consignment note made it clear that British Overseas Airways Corporation undertook the carriage from Cairo to Djibouti and that the whole freight from Cairo to Djibouti was payable to British Overseas Airways Corporation. They further said that Article 30 (3) gave the consignee a right of action against the last carrier, and they pointed out that the last carrier named in the consignment note was the British Overseas Airways Corporation and not the second defendants.

" The writ in the action was indorsed in the widest terms and claimed against the first and/or second defendants, as bailees or carriers, for damages for negligence, breach of duty, breach of contract, wilful misconduct, conversion, etc. The writ was issued on March 20, 1952, and served on the first defendants on the following day, just within the limitation period of two years provided by Article 29 of the Convention. I was informed by counsel that the plaintiffs were out of time in regard to taking proceedings against the second defendants in the Aden courts.

" Mr. Rodger Winn, who appeared on behalf of both defendants, admitted on behalf of the British Overseas Airways Corporation that they were liable for the limited sum of 250 francs per kilogram on the weight of the goods as provided by Article 22 (2) of the Convention. I understand that on this basis the liability of British Overseas Airways Corporation would be somewhat over £100 on goods admittedly worth about £8,000. One of the issues to be determined between the plaintiffs and British Overseas Airways Corporation on the trial of the action will be whether the loss was due to their ' wilful misconduct ' under Article 25, in which case they would not be entitled to take advantage of the provisions of Article 22 (2) referred to above.

" As regards the second defendants, Mr. Rodger Winn conceded that they were ' necessary ' parties to the action under R.S.C., Ord. 11, r. 1 (g), and further conceded that if the courts of this country had jurisdiction to entertain the plaintiffs' claim against them they were also ' proper ' parties within that sub-rule. He contended, however, that the terms of the Convention, which have the force of law in this country, precluded this or any English court from entertaining a claim against the second defendants in this particular case. His argument ran along these lines. On the face of the air consignment note (which was the contractual document) there was no contract of carriage between the plaintiffs and the second defendants, so that the plaintiffs could not sue the second defendants in contract at common law. Article 30 (1) of the Convention, which enacted that every carrier who accepted goods for international carriage was deemed to be one of the contracting parties to the contract of carriage in so far as the contract dealt with that part of the carriage which was to be performed by him, provided the necessary contractual link between the plaintiffs and the second defendants in respect of that part of the carriage which was in fact performed by the second defendants. He also pointed to the fact that the Services B.O. 471, from Cairo to Asmara, and B.O. 477, from Asmara to Djibouti, which were the services specifically provided for in the air consignment note, were services advertised by British Overseas Airways Corporation in their timetable as being operated by Aden Airways Ld., which was a wholly owned subsidiary of British Overseas Airways Corporation, and that whilst British Overseas Airways Corporation were described in the portion of the air consignment note devoted to ' charges ' as being the contemplated carriers from Cairo to Djibouti, that portion of the note was reserved for entries to be made by the carrier alone, whereas a glance at the description of the services which were to be used would inform anyone who looked at the British Overseas Airways Corporation's timetable that the contemplated carriage from Cairo to Asmara and from Asmara to Djibouti was to be performed, not by a British Overseas Airways Corporation aricraft but by an aircraft operated by Aden Airways Ld. I should here add that opposite the description of the services to be used there was the note: ' Method or routing—Agreed stopping places; see also timetables of the carriers and conditions on the reverse hereof.' Mr. Winn accordingly submitted that these goods were in fact lost whilst being carried upon a flight to which all the provisions of the Convention applied.

" He then turned to Article 28 (1), and pointed out that under that Article, if Aden Airways Ld. were to be sued at all, it must be either at Aden where they are admittedly ordinarily resident and had their principal place of business, or at Djibouti, which was the contractual place of destination of the goods. He submitted that the effect of that article, which in this country now has the force of law, was to limit the courts in which action could be brought to those set out in the article and thus, in the circumstances of this case, to oust the jurisdiction of the courts of this country to entertain a claim against the second defendants. There is no doubt that R.S.C., Ord. 11, r. 1, is only procedural in the sense that it deals with the circumstances in which leave may be given to serve a writ or notice of the writ out of the jurisdiction. It is perhaps unnecessary to say that the Order does not purport to enlarge or restrict the inherent jurisdiction of the courts of this country.

" Mr. Kerr, on behalf of the plaintiffs, argued that inasmuch as Aden Airways Ld. were nowhere mentioned in the contractual document, namely, the air consignment note, they were not parties to the contract of carriage nor were they deemed to be so under Article 30 (1), because that Article only provided that a subsequent carrier should be deemed to be a party ' in so far as the contract deals with that part of the carriage which is performed under his supervision.' He pointed out that the portion of the air consignment note which dealt with ' charges ' provided for carriage from Cairo to Djibouti by British Overseas Airways Corporation, and that British Overseas Airways Corporation were to receive the freight for that portion of the carriage.

" In my view the matter must be looked at more broadly. The actual service by which the whole carriage was to be performed were clearly set out in the air consignment note under the heading ‘ Type of Service ’. If these services were read in conjunction with the British Overseas Airways Corporation’s timetable it must have been clear to all interested parties that, whilst freight from Cairo to Asmara was to be paid to British Overseas Airways Corporation, that portion of the carriage was being undertaken by British Overseas Airways Corporation’s subsidiary Aden Airways Dakota Service. The carriage clearly started as an international carriage to be performed by successive carriers as one individual carriage, and I cannot think that when the goods were transferred at Cairo to an Aden Airways plane the carriage ceased to be an international carriage as defined by Article 1 (2) of the Convention and ceased to be subject to the conditions of the Convention. What was being done was, in my view, exactly what the plaintiffs contemplated would be done, or would have contemplated if they had directed their minds to the matter. I am accordingly of opinion that the whole contractual carriage from Amsterdam to Djibouti as evidenced by the air consignment note was on the face of it an international carriage by air and as such subject to the terms of the Convention.

“ In arriving at this conclusion I have been influenced by certain ‘ conditions ’ which are printed on the back of the air consignment note: ‘ (1) As used in this contract “ air waybill ” is equivalent to “ air consignment note ”, “ shipper ” is equivalent to “ consignor ”, “ carriage ” is equivalent to “ transportation ”, “ carrier ” includes the air carrier issuing this air waybill and all air carriers that carry the goods hereunder or perform any other services related to such air carriage. For the purposes of the exemption from the limitation of liability provisions set forth or referred to herein, “ carrier ” includes agents, servants or representatives of any such air carrier. Carriage to be performed hereunder by several successive carriers is regarded as a single operation. ’

“ ‘ (2) (a) Carriage hereunder is subject to the rules relating to liability established by the Convention for the Unification of Certain Rules relating to International Carriage by Air, signed at Warsaw, October 12, 1929 (hereinafter called “ the Convention ”), unless such carriage is not “ international carriage ” as defined by the Convention. (See carrier’s tariffs for such definition.) (b) To the extent not in conflict with the foregoing, carriage hereunder and other services performed by each carrier are subject to (i) applicable laws (including national laws implementing the Convention), government regulations, orders, and requirements, (ii) provisions herein set forth, and (iii) applicable tariffs, rules, regulations and timetables (but not the times of departure and arrival therein) of such carrier, which are made part hereof and which may be inspected at any of its offices and at airports from which it operates regular services.’

" ' (5) It is agreed that no time is fixed for the completion of carriage hereunder and that carrier may without notice substitute alternate carriers or aircraft. (Carrier assumes no obligation to carry the goods by any specified aircraft or over any particular route or routes or to make connexion at any point according to any particular schedule, and carrier is hereby authorized to select, or deviate from the route or routes of shipment, notwithstanding, that the same may be stated on the face hereof. The shipper guarantees payment of all charges and advances.'

" These conditions were presumably valid and formed part of the contract of carriage in so far as they did not conflict with the terms of the Convention. The definition of ' carrier ' in condition 1 strongly supports the view that the second defendants were to be considered as carriers although not mentioned in the air consignment note. Condition 2 (b) (iii) showed that timetables were to be incorporated as part of the contract of carriage, and the timetable published by British Overseas Airways Corporation made it clear that the portion of the carriage from Cairo to Djibouti was to be performed by Aden Airways Dakota Service. The conditions to which I have referred did not on their face appear to conflict with any of the provisions of the Convention. If they were to be regarded as incorporated in the contract of carriage they supported the view which I have expressed namely, that the mere fact that the portion of the carriage from Cairo to Djibouti was performed by Aden Airways did not deprive the carriage of its international character, and thus remove it from the scope of the Convention.

" Article 32 of the Convention provides in terms that any clause in the contract of carriage which purports to infringe the rule laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, shall be null and void. This article appears to reinforce the view that Article 28 (1) of the Convention, which deals with jurisdiction, was intended to be applied strictly, and I accordingly conclude that the effect of Article 28 (1) is to oust the jurisdiction of the courts of this country to entertain a claim by the plaintiffs against the second defendants.

" Mr. Kerr took a further point based upon the doctrine of deviation as applied in maritime law. He contended that when the second defendants failed to discharge the goods at Asmara and negligently permitted them to go on to Aden there was a deviation from the contractual voyage. He submitted that that fundamental departure from the contractual voyage entitled the plaintiffs to repudiate the contract of carriage which thus became deprived of its international character and so no longer subject to the terms of the Convention.

" He contended, in substance, that wherever the word ' carriage ' occurred in the Convention it must be taken to refer to carriage by the service provided for in the air consignment note, and that as soon as there was, as in this case, an over carriage or miscarriage not provided for in the air consignment note and factually linked with the loss of the goods, the whole nature of the carriage was changed and ceased to be the contractual carriage covered by the Convention. For a case of over carriage by sea which was held to amount to a deviation depriving the carrier of the benefit of the exception clause, see *Cunard Steamship Co. Ld.* v. *Buerger*, [1927] A.C. 1; 42 T.L.R. 653. Whilst I was at one moment attracted by this argument, I do not think that it is sound. Whilst over carriage or miscarriage with resulting loss, such as here occurred, might constitute such wilful misconduct as would render the carrier liable for the full value of the goods lost if he were sued in the appropriate jurisdiction, I cannot see anything in the Act or the Convention which enables me to say that such over carriage or miscarriage of the goods, as here occurred, deprived the carriage of its international character so as to remove it entirely from the ambit of the Convention.

" All I am here concerned with is, however, the issue whether the courts of this country have jurisdiction to entertain a claim of any kind against the second defendants. For the reasons which I have set out above I am satisfied that the plaintiffs' goods were lost upon an international carriage which was subject to the terms of the Convention. I am also satisfied that Article 28 (1) of the Convention ousts the jurisdiction of the courts of this country to entertain any claim against the second defendants. Even assuming that the doctrine of deviation, as known in maritime law, applied to air carriage, and assuming that the over carriage or miscarriage, which here occurred, amounted to an unjustifiable deviation from the contractual voyage, I can find nothing in the 1932 Act or the Convention which justifies the conclusion that what occurred in this case served to remove the carriage from the ambit of the Convention or to disentitle the second defendants from relying upon the provisions of Article 28 (1) of the Convention.

" I am of opinion that the court has no jurisdiction to entertain the plaintiffs' claim against the second defendants, and I direct that the writ and all subsequent proceedings in the action against the second defendants be set aside. The second defendants will have the costs of the hearing of the summons before me."

[Report: [1953] 1 W.L.R. 493.]

B—PARTS OF STATE TERRITORY

I.—Boundaries

i.—Land Boundaries

Boundaries—Land Boundaries—Cession of Territory on Re-adjustment of Frontier—Apportionment of Property of Frontier Local Authorities.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

II.—Rivers

iii.—International Rivers

(a) THE PRINCIPLE OF FREEDOM OF NAVIGATION ON INTERNATIONAL RIVERS.

International Rivers—Freedom of Navigation—Rhine Navigation Convention—Jurisdiction of Courts of Riparian States—Refusal of Jurisdiction—Denunciation of Rhine Navigation Convention by Germany—Restoration of Régime after the Second World War.

SWISS CORPORATION TANUTRA *v.* NEDERLANDSCHE RIJNVAAT-VEREENIGING.

Holland, District Court of Rotterdam. April 17, 1953.

THE FACTS.—This was an action between the owners of two vessels which, on December 19, 1947, collided on the Rhine near Cologne, in Germany. The owner of the damaged ship sued the owner of the colliding ship. Neither of the parties appears to have raised the question of the jurisdiction of the Court, but, for reasons which appear from the *Held* below, the Court considered *ex officio* the question of its jurisdiction.

Held: that a Netherlands Rhine Navigation Court is not competent in a Rhine navigation case. Such a case must, by virtue of Article 35 of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine, be brought before a German, French or Swiss Rhine Navigation Court.

The Court said: " The place of the collision lies within the British Zone of Occupation of Western Germany. The British High Commissioner, by his Ordinances No. 65 and 66 governing the river basin of the Rhine within the British Zone, has established courts of justice which were intended to act as Rhine Navigation Courts in the sense of the Revised Convention of Mannheim of 1868 concerning Navigation on the Rhine (hereafter called the Rhine Convention), which had been illegally denounced by Germany in 1936. Those Ordinances came into force on December 31, 1946. Navigation on the

Rhine in Western Germany was again to be governed by the Rhine Convention as from the moment that the courts in Germany for the adjudication of Rhine navigation in conformity with that Convention have been re-instated.

"The damage which the barge 'Rheinunion 9' is said to have incurred is damage in the sense of Article 34 (II) (*c*) of the Rhine Convention. From Articles 33 and 34 it appears that the States signatory to that Convention attributed (under Article 33) to the Rhine Navigation Courts, to the exclusion of any other court, jurisdiction over the disputes defined in Article 34. The basis of the competence *ratione personae* of those Courts is to be found in Article 35 of the Rhine Convention. On the coming into force of the Rhine Convention the Signatory States mutually renounced, as far as disputes under Article 34 are concerned, any provisions of their municipal law which in the matter of competence *ratione personae* might conflict with Article 35. Therefore a Netherlands Rhine Navigation Court is not competent in a Rhine navigation case which by virtue of Article 35 must be brought before a German, French or Swiss Rhine Navigation Court.

"Article 35, which deals with the regulation of the competence *ratione personae* between the Signatory States parties to this Convention, concerns the *ordre public*. A Netherlands court which, after the restoration of the normal Rhine régime, assumed jurisdiction over a dispute which under Article 35 falls within the jurisdiction of a Rhine Navigation Court in one of the other riparian States, would violate a Treaty entered into by the Netherlands. . . ."

[Report: *Tijdschrift*, Vol. I, p. 89.]

NOTE.—The opinion of the Court implies that, as the legal régime on the river Rhine has been restored by virtue of the Ordinances referred to above, a Netherlands tribunal would violate a treaty if it assumed jurisdiction in a dispute in which, according to Article 35 of the Rhine Convention, a German, French or Swiss Rhine Navigation Court would be competent. The general importance of the decision in this case is that a Court must *ex officio* decline competence in cases where the assumption of competence would involve a violation of international law. The same Court held otherwise in a judgment of December 1, 1950, but that was at a time when it was still unaware of the Ordinances above mentioned. After the denunciation of the Convention by Germany in 1936, the German Rhine Navigation Courts were liquidated. In order to adjudicate on collisions which had taken place in Germany, the Netherlands courts had reverted to Article 543 of the Netherlands Commercial Code (which designates the courts competent in cases of collisions to which the Rhine Convention does not apply). While recognizing the binding force of the Rhine Convention for the Netherlands, they used to hold that, in view of the German measures, the Convention could no longer be applied.

III.—Territorial Waters

v.—Coasting Trade and Fisheries

[*See also* PART IV, JURISDICTION: I, *Territorial.*]

Territorial Waters—Fisheries in—Fishing in Violation of Regulations—Effect on Norwegian Courts of Judgment of the International Court of Justice in the *Anglo-Norwegian Fisheries* Case.

REX *v.* COOPER.

Norway, Supreme Court. October 24, 1953.

THE FACTS.—The accused, a British subject, was convicted of having fished within Norwegian fisheries limits in the night between September 9 and 10, 1952, and condemned to a fine of 15,000 kroner (£750) and confiscation of catch and gear to the value of 90,000 kroner (£4,500). He appealed on the ground that he had not acted with gross negligence and that he tried to establish his position outside the territorial limits with some care.

Held: that the appeal must be rejected. The Court stated, with reference to the case of *Rex* v. *Martin* (see *infra*, p. 167), that negligent violation of the relevant Statutes was punishable and that it was, therefore, not necessary to decide whether there had been gross negligence or not. Judge Thrap, after having stated that the average fine and confiscation for illegal fishing since the liberation of Norway in 1945 until 1952 had been 30,000 kroner for a single violation of the Regulations, stated for the Court as follows (one Judge dissenting on one point):

" I believe that developments have proved that a much stronger penalty is necessary. In 1952 illegal fishing by foreign trawlers continued to about the same extent as in previous years. There is a particular reason to strengthen the repression of infractions which have taken place since the Norwegian fisheries limit has been recognized in international law by the Hague Judgment of 1951 (*I.C.J. Reports*, 1951, p. 116). It is important that the courts (*i.e.*, the municipal courts of Norway) should also contribute to ensuring complete respect for this limit. The Supreme Court has been informed that no foreign trawler has been arrested within the Norwegian fisheries limit in 1953. It is reasonable to assume that the increased fines and confiscations have been a contributory factor in this improvement."

[Report: *Norsk Rettstidende*, 1953, p. 1312.]

See also, to the same effect, *Rex* v. *Pedersen*, decided by the Supreme Court on October 24, 1953 (*Norsk Rettstidende*, 1953, p. 1323) and *Rex* v. *Olivier*, decided on the same day (*ibid.*, p. 1327).

Territorial Waters—Fisheries Inside Territorial Waters—Negligent Infraction of Regulations—Whether Punishable—The Law of Norway.

REX *v.* MARTIN.

Norway, Supreme Court. February 12, 1953.

THE FACTS.—The accused, a French citizen, had fished within Norwegian territorial limits on May 21, 1950. It appeared—although this point, not being in issue, was not decided—that he fished in waters lying between the Norwegian fisheries line and the line as claimed by the United Kingdom in the *Fisheries* case which was later decided in favour of Norway by the International Court of Justice (*I.C.J. Reports*, 1951, p. 116). The accused claimed that he had acted in good faith since he fished outside the limits as marked on British maps which he had received from his employers. He said that he had not been able to procure Norwegian maps. He was found guilty by the Court of first instance, which imposed a fine of 5,000.00 kroner (about £250) in addition to the partial confiscation of catch and gear.

He appealed on the ground that the Norwegian fisheries line was contrary to international law. He abandoned this contention after the International Court of Justice had decided the dispute between the United Kingdom and Norway. But he claimed that he should have been acquitted since he had violated the fisheries only by negligence and there was no criminal intention on his part.

Held: that the appeal must be rejected. Judge Eckhoff said for a unanimous Court:

" The accused is condemned for having negligently violated the Statutes. It is not stated either in the Statute of 1906, § 4, or in § 12 of the Statute of 1939 that a mere negligent violation of the law is punishable. But I find it beyond doubt that such was the intention. The task of the authorities in upholding the fisheries limits would be greatly impeded if infractions by negligence were not covered by the penal provisions."

[Report: *Norsk Rettstidende*, 1953, p. 184.]

IX.—Lakes and Land-Locked Seas

Territorial Waters—Limits of—Pearl and Chank Fisheries—Landlocked Sea Areas.

A.M.S.S.V.M. & CO. *v.* THE STATE OF MADRAS AND ANOTHER.

India, High Court of Madras. February 24, 1953.
(Venkatarama Ayyar J.)

THE FACTS.—This was a petition for a writ of *certiorari* to quash an order of the State of Madras, dated March 13, 1951, issued under an Act of the State (XXVI of 1948) which abolished the estate

(Zamindari) of the second respondent, the Raja of Ramanathapuram. The Raja had granted to the petitioner a lease of the right to fish chanks in the Gulf of Mannar and Palk Bay opposite the coast of his estate. The entire estate now vested in the State of Madras, and the petitioner was deprived of his right to fish chanks. One of his contentions in the present case was that the State of Madras, as a member State of the Union of India, had no legislative power extending to rights of fisheries outside territorial waters, this power being exclusively within the competence of the Union. Apart from constitutional issues, the question arose whether the fishing areas involved in the petition were within or without the territorial waters of the State.

Held: that the fishing areas involved in the petition were within the territorial waters of the State.

The Court said: " It is necessary for a correct appreciation of the true legal position to relate the history and nature of the chank fisheries off the coast of Ramanathapuram which form the subject-matter of this application. Between the mainland of India forming the southernmost portion of it and the Island of Ceylon which lies to the east and south of it, there lies a large expanse of sea water, the northern section of which is termed the Palk Bay and the southern the Gulf of Mannar. [After discussing the exact geographical position of the area in question the Court said further:] " Palk Bay is practically landlocked and partakes of the character of inland waters and . . . the Gulf of Mannar in its northern portion off the coast of Ramanathapuram, which is what we are concerned with in this application, is of the same character.

" From time immemorial both these gulfs have been famous for their pearl fisheries and chank fisheries. The rocks and reefs in which they abound have furnished excellent breeding ground for pearl oysters. On the bottom of these gulfs are sand beds of a special kind, called ' Puchi Manal ', which breed worms on which chanks thrive. Beds of pearl fish and chank fish are to be found in abundance scattered all over the area and they are marked in maps prepared for the Fisheries Department. The chank beds are mostly at a depth seldom exceeding 50 feet, often less and sometimes more, and they lie at varying distances from the shore, the farthest of them being 20 miles from the Indian coast. There are similar beds off the coast of Ceylon . . . Pearl fisheries and chank fisheries have been from the earliest times important and lucrative trades in this area. The Sovereigns of the country considered themselves as exclusive owners of the beds of pearl oysters and chanks, granted licences for their exploitation, and levied royalty thereon . . . That right came to be vested in the Raja of Ramanathapuram under a grant from the Nayak Rulers of Mathurai. When the British Government effected a Permanent Settlement in accordance with

Regulation XXV of 1802, they affirmed the grant and included the royalty on the chanks as one of the heads of revenue for calculating peshkush, and thus the right to chank fishery came to be annexed to the Zamindari of Ramanathapuram " (now abolished by the Madras Act, XXVI of 1948).

The Court referred, *inter alia*, to Vattel's *Droit des Gens* (Vol. I, Ch. XXIII) in which Vattell observed : " Who can doubt that the pearl fisheries . . . of Ceylon may be lawful objects of ownership ? " The Court also referred to a previous case decided by the High Court of Madras in a similar matter (*Annakumaru Pillai* v. *Muthupayal*, 1904, 14 M.L.J. 248) in which a lessee of chank fisheries in the same region complained " that the accused had fished chanks in the area leased to him and had thereby committed theft." The point for decision was whether the Raja could lay any claim to fisheries beyond the territorial waters. Subramania Ayyar Offg. C.J., after remarking that the limits of territorial waters were not settled in international law, referred to the principle enunciated in *Direct United States Cable Company* v. *Anglo-American Telegraph Company*, (1877) 2 A.C. 394, that occupation of a bay for a long time by one State and acquiescence therein by other States were sufficient to support the title of that State to the bay. After referring to the continuous occupation of the pearl fisheries and chank fisheries by successive Sovereigns of the country from the earliest times, the learned Judge concluded with the following observation: " To say the least, the parts of the sea falling between the respective coasts and the lines opposite each connecting the extreme points seawards of the limits of the fisheries in question, are British territorial waters."

The Court upheld the principle of effective occupation of the area in question and the acquiescence by other States in such occupation, and concluded that:

" In view of these authorities it must be held that the fishing areas involved in the petition are within the territorial waters of the State."

[Report: 1953, II M.L.J. 587.]

NOTE.—(1) The facts in *Annakumaru Pillai's* case were different from those in the present case in that, whereas the maritime areas in question were, before the independence of India and Ceylon, surrounded by the territories of the same International Person represented by the British Government, they are now surrounded by the territories of two separate International Persons, which circumstance deprives the waters in the Bay and the Gulf of the character of landlocked waters ascribed to them by the Court.

(2) It is important to remember that chank fish is not ordinary fish but sedentary and capable of possession. It does not fall within the category of fisheries *sensu stricto*. Occupation of the area of exploitation of chank fish or pearl oysters, outside the *ordinary* limits of territorial waters, must therefore be considered on a different basis from that relating to ordinary fisheries.

PART IV

JURISDICTION

A—IN GENERAL. TERRITORIAL AND PERSONAL

I.—Territorial

i.—Over Territory in General and Persons and Property Situated therein. Territorial Limits of Jurisdiction. Expropriation of Alien Property.

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, IV, Recognition of Acts of Foreign States and Governments, *and* D, Recognition of States and Governments.]

Jurisdiction—Territorial—Air Law—International Air Law Conventions—Meaning of " International Carriage " of Goods by Air—Successive Carriers—Liability under Warsaw Convention of 1939 for Loss of Goods—Whether Court May Entertain Action against Carrier Incorporated Abroad—Carriage of Goods by Air Act, 1932.

See p. 156 (*Rotterdamsche Bank N.V. and Another* v. *British Overseas Airways Corporation and Another*).

Jurisdiction—Exterritorial Effect of—Confiscation of Property—Expropriation of Foreign Business—Trade Mark Owned by Foreign Business—Fate of Trade Mark Abroad—Divisibility of Trade Mark—Reparations Agreement of January 14, 1946.

See p. 438 (*Administration des Domaines and Others* v. *Établissements Sidney-Merlin and Others*).

iii.—Over Ports and National Waters

[*See also* PART III, STATE TERRITORY: B, III, Territorial Waters.]

Jurisdiction—In Port—Action by Foreign Seaman Against Foreign Shipowner for Injury Sustained in Foreign Port—Statute Giving Right of Action to Seamen Suffering Personal Injury in the Course of Their Employment—Extraterritorial Effect of Legislation.

See p. 197 (*Lauritzen* v. *Larsen*).

iv.—At the Maritime Frontier. Hovering Laws

[*See also below*, C, High Seas.]

Jurisdiction—At the Maritime Frontier—Foreign Merchant Vessel in National Waters—Violation of Revenue Laws of Territorial State.

MASTER AMIRUZZAMAN AND OTHERS *v.* THE CROWN.

Pakistan, High Court of Dacca (Criminal Appellate). May 22, 1953.
(Ispahani and Ibrahim JJ.)

THE FACTS.—The accused, Pakistani nationals, were the Master and crew of the *At-it Thakur*, a vessel registered in India and flying the Indian flag. The *At-it Thakur* was intercepted in Pakistani waters and the crew were arrested by the police and charged with having smuggled large quantities of salt into Pakistan contrary to the Sea Customs Act, 1878, which subjected salt to an import duty. It was alleged that they had landed this quantity of salt from the *At-it Thakur*. The Master and crew contended that a private merchant ship is nevertheless a piece of floating territory belonging to the State of its flag and registration, and that consequently it was not subject to the jurisdiction of any other State even when it entered the waters of such State. Hence, it was contended, the arrest of the Master and the crew on board the *At-it Thakur* even in Pakistani waters was illegal and contrary to international law.

Held: that the contentions of the Master and crew must be rejected. Such a state of things as had been alleged by the Master would be wholly inconsistent with the sovereignty of any State into the waters of which a merchant ship might enter. According to international law, privately-owned merchant ships, on entering the territorial waters of any State became thereby subject to its laws and to the jurisdiction of its courts. Moreover, the Master and the crew were Pakistani nationals and were, therefore, bound by the law of Pakistan wherever they might be and irrespective of the fact that they might happen to be abroad, or serving in a foreign ship, or employed by a foreign company. It is a principle of international law that the subjects of a sovereign continue to owe allegiance to their sovereign wherever they may be, and that they remain under its laws even though they enter the territory of another sovereign.

Per Ibrahim J. (*inter alia*): " There is obviously some confusion as to the legal status of this vessel in the waters of Pakistan, and I think this matter should be clarified. To concede that this vessel is not subject to the jurisdiction of the Courts of Pakistan would be to lay down that a private merchant vessel of foreign registry is absolutely free to do anything in the national waters of Pakistan and can with impunity transgress its laws, injure its trade and jeopardise its revenue. Such a state of things would be thoroughly inconsistent with the sovereignty of this State. I am not aware that such a claim can be or has been ever made by any State. Sovereignty means independence, external and internal, and supremacy, territorial and personal. These are the ' recognised and therefore protected qualities of States as International Persons.' "

His Lordship then quoted from Oppenheim, *International Law*, 7th ed., Vol. I, § 124, pp. 255, 256, and from Brierly, *The Law of Nations*, p. 173, and discussed, *inter alia*, *Chung Chi Cheung* v. *The King*, [1939] A.C. 160,[1] *The Parlement Belge*, L.R. 5 P.D. 197, and *The Schooner Exchange* v. *M'Faddon and Others*, 7 Cranch. 116, and concluded that a privately-owned merchant ship did not, under the law of nations, enjoy the privileges of a vessel belonging to a sovereign. His Lordship continued:

" It is abundantly clear that a private merchant vessel of a foreign country and its crew and contents are not exempt from the jurisdiction of the Courts of this country.

" It should be observed that the petitioners have misconceived their position. They are subjects of Pakistan. By reason of its personal supremacy this State exercises jurisdiction over its subjects wherever they may be. If they are in a foreign Country, they become also subject to the jurisdiction of the Courts of that country for the time being; but they continue to be subject to the jurisdiction of their own Country. There is nothing wrong or unjust in this, for the nationals of a State, wherever they go, enjoy the protection of their own Government, and it is quite right that they should continue correspondingly to be subject to its jurisdiction. The act complained of against the petitioners, is alleged to have been done by them in Pakistan. The fact that they committed it in or by using a merchant vessel of a foreign country, or as servants of, or in alliance with, a foreign Company, does not entitle them to any exemption from the jurisdiction of the Courts. . . ."

Ispahani J. concurred.

[Report: Pak. L.R. (1953), 3 Dacca 516.]

Jurisdiction—At the Maritime Frontier—Ships in Territorial Waters—The Law of Israel.

See p. 153 (*Silberwacht* v. *Attorney-General*).

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[1] See *Annual Digest*, 1938–1940, Case No. 87.

viii.—Exemptions from and Restrictions upon Territorial Jurisdiction.

(a) FOREIGN STATES.

[*See also* PART II, STATES AS INTERNATIONAL PERSONS: A, II, Sovereignty and Independence: iii, Conduct of Foreign Relations. Conclusiveness of Statements of the Executive.]

Jurisdiction—Exemptions from—Foreign States—Action against Agent as Involving Adjudication of Claim against Foreign State or Property of Foreign State—Waiver of Immunity.

FRAZIER *v.* HANOVER BANK.

United States, Supreme Court of New York, Special Term, New York County. January 27, 1953.

THE FACTS.—The plaintiff had been the owner of bonds issued by the Republic of Peru, which had been in default in the payment of interest since 1932. In 1947 Peru offered new bonds, to be issued in exchange for the original bonds upon a waiver of all unpaid interest. The offer provided that if any of the "non-assenting bonds should ever be accorded treatment more favourable than that provided for assenting bonds hereunder, the assenting bonds shall be entitled to all the benefits thereof." The plaintiff assented to this offer and exchanged his old bonds for the new ones, which did not, at least in terms, incorporate the quoted language of the offer. He later sold the new bonds. In January 1953, subsequent to the sale of the bonds, the Republic of Peru agreed to issue scrip certificates for 10 per cent. of the defaulted interest due on the original bonds, to be delivered to the new owners thereof, and turned over the certificates to the defendant Bank for distribution.

The plaintiff brought an action to enjoin the defendant from diverting any of the certificates from the plaintiff and other persons similarly circumstanced, and to direct the defendant to distribute the certificates solely to the plaintiff and the members of his class. He also moved for an injunction *pendente lite*. The defendant moved to vacate the service of the summons and to strike out the complaint on the ground that the defendant was a mere agent of the Republic of Peru and therefore not subject to the jurisdiction of the Court. The defendant's motion was supported by a representation to the Court by the United States Attorney that the Secretary of State had advised the Attorney-General of the United States that the Department of State recognized and allowed a claim of immunity under international law made by the Ambassador of Peru and requested that the Court be acquainted with the complaint of the Peruvian Ambassador, with the suggestion that Peru was immune from the jurisdiction of the Court.

Held: that the motion for an injunction *pendente lite* must be denied, and that the defendant's cross-motion to vacate the service of the summons and strike out the claim must be granted. The action was in effect one against a foreign sovereign, and the Court accordingly did not have jurisdiction.

The Court said: " I take it for granted, of course, that the State Department has not gone outside the scope of its proper functions and attempted to determine that this particular action is in effect a suit against Peru, that its ' recognition and allowance of the Peruvian Ambassador's claim of immunity ' means no more than that Peru is recognized by the State Department as a foreign sovereign which has and should be accorded such immunity from suit as a sovereign has under international law, and that there hence is still open for judicial determination the question whether or not this particular action actually does require an adjudication of a claim against a sovereign to such an extent and in such manner as to make it one in which the court cannot proceed without violating Peru's sovereign immunity. See *Lamont* v. *Travelers Ins. Co.*, 281 N.Y. 362, 373, 374, 24 N.E.2d 81, 86[1]; *Matter of U.S. of Mexico* v. *Schmuck*, 293 N.Y. 264, 56 N.E.2d 577[2]; *Ex parte Republic of Peru*, 318 U.S. 578, 63 S.Ct. 793, 87 L.Ed. 1014. . . ."

" Defendant of course has no personal immunity of its own, and it of course cannot escape responsibility for its acts by asserting that it performs the acts at the direction of a foreign sovereign. Conversely, however, the fact that plaintiff names as sole party defendant an agent of Peru, instead of Peru itself, and is liable to effect service of the summons upon that agent, does not enable plaintiff to obtain an adjudication of a claim against Peru in the face of Peru's assertion of its sovereign immunity.

" In the end, therefore, the question is whether this action is in substance an action against Peru in the sense that it seeks an adjudication of a claim against Peru or involves specific property in which Peru claims an interest.

" Plaintiff argues that whether the scrip certificates which Peru has delivered to defendant are delivered by defendant solely to members of the class of which plaintiff is one or are delivered by defendant to other holders of bonds of Peru, the amount of money which Peru ultimately will have to pay will be the same, and it can make no difference to Peru whether that amount of money is paid to A, B and C or to X, Y and Z, and hence Peru is not interested in or affected by this action. The argument is of doubtful validity. Its premise does not support its conclusion, and I am not sure that its premise is true. But even if the argument be sound, the fact nevertheless remains that for reasons of its own Peru has decided that it desires that these scrip certificates shall be delivered to the holders of all its outstanding bonds whereas plaintiff is seeking to compel their delivery to only a portion of such holders, or, conversely stated, is seeking to prevent their delivery to others than a portion of such holders, and as the basis for such relief plaintiff asserts that Peru has bound itself by contract to make delivery to only that portion of such holders. It may be assumed that Peru denies that there is any such contract, but if it admit that there is such a contract, then the situation is that Peru feels that, contract or no contract, its own best interest demands that it handle its external debt in the way it has decided to handle it, rather than in the way the contract provides. It seems to me plain, therefore, that by this action plaintiff is seeking, first, to establish that Peru made the contract he claims and, then, to compel Peru, against its will, to abide by that contract; and that is precisely such an adjudication of a claim against a sovereign as sovereign immunity precludes. See *Gledhill* v. *Schiff*, 224 N.Y. 593, 120 N.E. 863; *Ezra* v. *Lamont*, 149 Misc. 912, 268 N.Y.S. 222[1], affirmed 241 App.Div. 805, 271 N.Y.S. 951, 265 N.Y. 635, 193 N.E. 421; *Lamont* v. *Travelers Ins. Co.*, 281 N.Y. 362, 24 N.E.2d 81, Id., 294 N.Y. 827, 62 N.E.2d 388; *Gallopin* v. *Winsor*, 234 App.Div. 601, 251 N.Y.S. 448[2]; *Hewitt* v. *Speyer*, 2 Cir., 250 F. 367; *State of New Mexico* v. *Lane*, 243 U.S. 52, 37 S.Ct. 348, 61 L.Ed. 588; *State of Louisiana* v. *Garfield*, 211 U.S. 70, 29 S.Ct. 31, 53 L.Ed. 92; *State of Oregon* v. *Hitchcock*, 202 U.S. 60, 26 S.Ct. 568, 50 L.Ed. 935; *Naganab* v. *Hitchcock*, 202 U.S. 473, 26 S.Ct. 667, 50 L.Ed. 1113; *Morrison* v. *Work*, 266 U.S. 481, 45 S.Ct. 149, 69 L.Ed. 394; *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 57 S.Ct. 359, 81 L.Ed. 545[3]; *U.S. ex rel. Goldberg* v. *Daniels*, 231 U.S. 218, 34 S.Ct. 84, 58 L.Ed. 191.

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[1] See *Annual Digest*, 1938–1940, Case No. 73.]

[2] *Ibid.*, 1943–1945, Case No. 21.]

"Plaintiff further argues that the legal effect of the arrangements under which Peru has delivered the scrip certificates to defendant is to make defendant a trustee thereof for plaintiff and his class, rather than a mere paying agent of Peru. The argument seems to run counter to *Noyes* v. *First National Bank*, 224 N.Y. 542, 120 N.E. 870; *Erb* v. *Banco di Napoli*, 243 N.Y. 45, 152 N.E. 460, 50 A.L.R. 1009, and *Gledhill* v. *Schiff*, 224 N.Y. 593, 120 N.E. 863; but the important point here is that the argument itself is a demonstration that what plaintiff is here trying to do is to obtain an adjudication that Peru has contracted in a certain way with respect to its property and then compel compliance with that contract. Such an adjudication could not be made without Peru's presence, and it is that presence which Peru's sovereign immunity prevents the court from obtaining.

"Finally, plaintiff argues that Peru has waived its sovereign immunity and consented to being sued in New York because a new bond which Peru is issuing as a part of and in connection with the general plan under which the scrip certificates here involved are being issued contains the statement:

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[1] See Annual Digest, 1933–1934, Case No. 62.]

[2] *Ibid.*, 1931–1932, Case No. 89.]

[3] *Ibid.*, 1935–1937, Case No. 228.]

> 'This General Bond is being delivered in the City of New York, State of New York, and shall be governed by the laws of the State of New York in the construction thereof.'

"I think that is patently untenable. The provision quoted is not in any sense a consent to be sued or a waiver of immunity. Furthermore it is not contained in any instrument involved in this action or from which plaintiff derives any rights. See *Matter of U.S. of Mexico* v. *Schmuck*, 293 N.Y. 264, at pages 268, 269, 56 N.E.2d 577, at pages 577, 579."

[Reports: 204 Misc. 922, 119 N.Y.S.2d 319; affirmed, 281 App. Div. 861, 119 N.Y.S.2d 918.]

NOTE.—(1) The scrip certificates issued by the Government of Peru were the subject of further litigation in *Frazier et Al.* v. *Foreign Bondholders Protective Council, Inc. et Al.*, 133 N.Y.S.2d 606 (*International Law Reports*, 1954).

(2) The decision has been noted in *International and Comparative Law Quarterly*, 3 (1954), p. 169.

Jurisdiction—Exemptions from—Foreign States—Immunity from Counterclaim in Action Brought by Foreign State—Effect of Failure of Foreign State to Claim Immunity—Allegation that the Foreign Government Concerned is Not a "Friendly" Government—The Law of the United States of America.

HUNGARIAN PEOPLE'S REPUBLIC *v.* CECIL ASSOCIATES, INC., *ET AL.*

United States, District Court, Southern District, New York.
December 29, 1953.

THE FACTS.—This was an action by the Hungarian People's Republic for the return of a $9,000 security deposit on premises which had been leased by the plaintiff for consular purposes for three years, from June 1, 1951. On December 28, 1951, the Secretary of State of the United States required the Hungarian People's Republic to close its Consulate in New York City on the ground that Hungary had refused to allow United States consular officers to exercise protective functions on behalf of certain Americans detained by that Government. The plaintiff vacated the premises on December 31, 1951, and demanded the return of the deposit, which was refused.

To the complaint in this action, the defendants answered with general denials, affirmative defences, and counterclaims for unpaid rent, loss of anticipated profits, and losses incurred in the sale of the premises in a vacant condition. The Hungarian People's Republic moved to dismiss the counterclaims on the ground they sought affirmative judgment against an immune sovereign without the consent thereof. After argument on the motion, the Court addressed a letter to the Secretary of State asking to be advised

> "whether the Department of State recognizes and allows the claim of the Hungarian People's Republic to immunity from suit as a friendly foreign sovereign."

The reply of the Department of State stated in part:

> ". . . The United States Government recognizes the Hungarian People's Republic and maintains diplomatic relations with it. However, no claim of immunity has been made to the Department by any representative of the Hungarian People's Republic in this matter, and, on the basis of the information set forth in your letter, the Department does not recognize and allow any such claim now made to the court . . .".

On a motion to dismiss the counterclaims,

Held: that the motion must be granted. The plaintiff Government, having invoked the processes of the Court, was not entitled to immunity against the granting to the defendants, by way of set-off, of relief limited to the extent to which the plaintiff sought affirmative relief. The plaintiff was a friendly foreign sovereign and hence was entitled to immunity from judgment in excess of its claim.

The Court said: "The recognition of the Hungarian People's Republic by the Government of the United States and the maintenance of diplomatic relations between them, however strained, accords to the Hungarian People's Republic the right to appear in the suit and to raise the jurisdictional question. This, notwithstanding the election by the Hungarian People's Republic not to bring its status to the court's notice by the accepted diplomatic practice of representations by the foreign sovereign to our State Department and the attendant suggestion of immunity to the court by the State Department on the recognition and allowance by the State Department of a claim of immunity.[1]

"Having invoked the process of this court in its quest of the $9,000 deposit under the lease, the Hungarian People's Republic, to that extent, has consented to jurisdiction and cannot be heard to plead immunity against the granting to the defendants, by way of set-off, of relief at least to the extent to which the plaintiff seeks affirmative judgment.[2]

"The troublesome question is whether the commencement of this suit by the Hungarian People's Republic constitutes consent to jurisdiction beyond a set-off equal to the plaintiff's claim. It is urged by the defendants that the plaintiff by submitting itself to the jurisdiction of this court thereby suffers a total loss of immunity and may be held accountable for damages in excess of its $9,000 claim.

"In view of the certification by the Department of State that diplomatic relations prevail between this government and the Hungarian People's Republic, the only basis upon which the defendant's contention might be sustained is that, despite those diplomatic relations, the Hungarian People's Republic is not a friendly foreign sovereign.

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[1] *In re Muir*, 254 U.S. 522, 532, 41 S.Ct. 185, 65 L.Ed. 383.

[2] *United States* v. *New York Trust Co.*, D.C.S.D.N.Y., 75 F.Supp. 583 [*Annual Digest*, 1946, Case No. 12].

" The defendants argue that the unique facts here presented call for an exception to the general rule that a defendant's claim against a foreign sovereign plaintiff is limited to a set-off. They point to the diplomatic note of December 28, 1951 and the reasons therein for the demand by the United States that the plaintiff's consular office in New York be closed and ask a finding thereon that the plaintiff is not a friendly foreign sovereign and hence is shorn of its immunity to judgment in excess of its claim.

" This contention must be rejected for the 'friendliness' of a foreign sovereign, with whom diplomatic relations are maintained, is a subject for political and not judicial determination. Great embarrassment might be caused the executive branch of the government in its relations with foreign nations if the judiciary were to undertake in individual cases the determination of whether a foreign sovereign with whom diplomatic relations are maintained is friendly or otherwise."[1]

[Report: 118 F. Supp. 954.]

Jurisdiction—Immunity from Jurisdiction of Local Courts—Legal Position of Foreign States in Contentious Proceedings—Whether Foreign States Immune in respect of Acts *jure gestionis*.

In re DANISH STATE RAILWAYS IN GERMANY.

German Federal Republic, District Court of Kiel. March 19, 1953.

THE FACTS.—The plaintiff instituted proceedings against the Kingdom of Denmark for damages for personal injuries sustained as a result of the alleged negligence of the driver of an omnibus which was owned by the Danish State Railways and was then operating in Germany. The Court of first instance refused to exercise jurisdiction in the matter, on the ground that the Kingdom of Denmark was immune from the jurisdiction of the German courts. The plaintiff appealed.

Held: (i) that the operation of bus services by the Kingdom of Denmark was a commercial activity, and that in respect of activities of this nature a sovereign State was not entitled to immunity from the jurisdiction of the local courts ;

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[1] " It is a doctrine borne of expediency, nourished in the council halls of nations as well as the courts of justice. Its dominant motif is political. It has gained stature in the world of international diplomacy and politics, where an 'incident' involving the dignity of nations is measured by its explosive potential as well as its legal implications. '. . . it rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly " imperil the amicable relations between governments and vex the peace of nations " '. *Oetjen* v. *Central Leather Co.*, 246 U.S. 297, 302, 38 S.Ct. 309, 311, 62 L.Ed. 726." *Frazier* v. *Foreign Bondholders Protective Council, Inc.*, App. Div., 125 N.Y.S.2d 900, 903 [see *International Law Reports*, 1954]."

(ii) that the jurisprudence of the former Supreme Court of Germany (Reichsgericht), in so far as it recognized the immunity of foreign States from the jurisdiction of the German courts in respect of *acta jure gestionis*, was no longer binding;

(iii) that, accordingly, the judgment of the Court of first instance must be reversed, and the action allowed to proceed on the merits.

The Court said: " International doctrine and jurisprudence unanimously agree that, by virtue of international customary law, foreign States are not subject to the local jurisdiction where it is intended to hold them responsible for liabilities deriving from acts of sovereignty. This exemption is based on the legal principle that sovereign States are independent and their rights of sovereignty beyond the reach of other States. This principle, however, is not applicable in the present case, because the Kingdom of Denmark does not here face the plaintiff in the capacity of possessor of sovereign rights, but as possessor of civil rights and duties. The plaintiff seeks to hold the defendant State responsible in its capacity of operator of an omnibus, *viz.*, in respect of activities which are of a purely fiscal nature. To that extent the Kingdom of Denmark is subject to the jurisdiction of the German courts. This Court is unable to share the contrary view of the Court of first instance which assumed that foreign States are, by virtue of the general rules of international law, never subject to the jurisdiction of the courts of other countries, not even when the action is concerned with the fiscal activities of a State. We are unable to follow any longer the jurisprudence of the Supreme Court (Reichsgericht), as developed between the years 1905 and 1921, which adopted the basic proposition that, according to the rules of international law, a foreign State is always exempt from the jurisdiction of the German courts, and which answered in the negative the question whether the operation of a business enterprise by one State in the territory of another constituted a waiver of sovereign rights by the first State (*cf.* RGZ, vol. 62, p. 165; *ibid.*, vol. 103, p. 274). The existence of such an extensive general rule of international law can no longer be recognized. There is a growing tendency among writers in favour of the view that a distinction must be drawn between the State as the possessor of sovereign rights and the State as an entity of civil law, and that a State must be subject to the jurisdiction of foreign courts in respect of activities of a private and civil nature. The reason why the old view of the law is no longer adhered to may be found in the fact that entities possessing sovereign rights are taking an increasing part in economic activities. Their exemption from the jurisdiction of foreign courts in matters of a private and civil nature would be tantamount to denying to their creditors the legal protection to which they are entitled. Moreover, it might constitute an obstacle to international economic activities. The courts of Switzerland, Italy and Belgium, and to some extent also those of France, have already adopted the view which is here expressed by this Court.

" The Court is unable to deduce the contrary view from the judgment of the District Court of Appeal of Hamburg (reported in MDR, vol. 53, p. 109), which rejected an appeal against a refusal to fix a date for the trial of an action against the Kingdom of Denmark. The questions which are relevant in the present case were not determined in that case because the claims there put forward were concerned with acts of sovereignty of the defendant State."

[Report: JZ, 9 (1954), p. 117.]

Jurisdiction—Foreign States—Exemptions from—Real Property Owned by Foreign State—Property Not Used as Residence of Envoy or for Diplomatic Business—Whether Property Subject to Local Jurisdiction—Diplomatic Representative of State Incorporated into Another State—Non-Recognition of Incorporation—Capacity to Sue.

REPUBLIC OF LATVIA CASE.

German Federal Republic, Restitution Chamber of Berlin.
October 3, 1953.

THE FACTS.—The Republic of Latvia, before its incorporation into the Soviet Union, purchased a house in Berlin from a person who, by virtue of the relevant legislation enacted in Germany after the Second World War for the benefit of vendors who had been subject to the discriminatory legislation of the National-Socialist régime, would have been entitled to claim its return if the purchaser had been a private individual. The former owner accordingly brought an action for the return of his property (which, after the destruction of the house during the war, now consisted only of the ground on which the house had previously stood) against the diplomatic representative of the so-called Latvian " National Government ", who continued to represent the interests of the former Republic of Latvia in Western Europe after the incorporation of Latvia into the Soviet Union. On behalf of the defendant it was contended that as the property was owned by an independent sovereign State (the incorporation of Latvia into the Soviet Union not having been recognized by the Federal Republic of Germany), the action should be dismissed for want of jurisdiction.

Held: (i) that the diplomatic representative of the Latvian " National Government " was entitled to conduct proceedings on behalf of the Republic of Latvia, on the ground that the incorporation of Latvia into the Soviet Union had not been recognized by the Federal Republic of Germany;

(ii) that, notwithstanding that as a general rule a foreign State was not subject to the jurisdiction of the German courts, the latter were entitled to exercise jurisdiction over all real property situate in Germany unless such property was being used as a residence for the diplomatic representative or for purposes of the diplomatic business of a foreign State;

(iii) that the property here concerned was not being used, and indeed could not be used, for such purposes because it consisted only of ground on which a house had previously stood. The plaintiff was accordingly entitled to proceed with the action for the return of his property as if the defendant were a private individual.

Obiter: even premises used for the purpose of consular business are not "extraterritorial", in the absence of consular treaties providing specifically for their exemption from local jurisdiction.

The Court said: "There is no legal objection to the recognition of the *locus standi* of the Republic of Latvia. According to a communication received from the Foreign Office of the Federal Republic of Germany, the Republic of Latvia is regarded as continuing to exist, because the annexation of the territory of Latvia by the Soviet Union is not recognized by the Federal Republic. The diplomatic representative of Latvia who is domiciled in London, where he exercises his functions, has therefore validly delegated his powers . . . to act in the present restitution proceedings.

"The general principle of international law that no State may be brought before the courts of another State applies in international procedural law. The rule is based upon mutual respect for the independence and equality of sovereign States. On the other hand, there are good reasons for the view that this rule does not apply where the foreign State enters into commercial relations with other States or with subjects of the latter, *viz.*, where it does not act in its sovereign capacity but exclusively in the field of private law, by engaging in purely private business, and more especially in commercial intercourse. The rule of exterritoriality does not apply where there is an exclusive venue based on ownership or possession, because the foreign State, on purchasing the property, must have taken into account the jurisdiction of the local courts which is derived from the notion that the soil, as an inseparable part of the State territory, can be subject only to the jurisdiction of the State to which it belongs. It follows that the defendant submitted to the application of German civil law when it purchased the property. Accordingly, it is now equally subject to the legal consequences flowing from the purchase of the property, as now enacted in the Restitution Law. This result remains unaffected by the general principle of international law according to which a foreign State is not subject to local jurisdiction *ratione rei situs* if the property concerned is a legation. The extraterritoriality of the legation and residence of a foreign envoy, which flows from the concept of their inviolability, can be recognized only when the property is in fact occupied by extra-territorial [*sic*] persons. This is not the case here, because the house was destroyed during the war and is now in ruins.

"Even if there was to be consular representation in Berlin in the future, it cannot be assumed that the consular offices would be installed on this piece of ground. Quite apart from that, however, a house used exclusively for consular business would not be extra-territorial, because consuls and their offices are, as a general rule, subject to the local jurisdiction unless there are in existence special consular treaties providing for exemption. In view of the fact, therefore, that this property is not being used for diplomatic purposes at present and that it cannot be assumed that it is intended so to be used in the future, the defendant in the present case is in exactly the same position as any private individual liable to make restitution."

[Report: RzW, 4 (1953), p. 368.]

Jurisdiction—Territorial—Exemptions from—Foreign States—Nationalization of Foreign Business Enterprise by Foreign State—Trade Mark Owned by Enterprise in Country of Forum—Whether Courts of Forum Entitled to Exercise Jurisdiction over Trade Mark.

See p. 438 (*Administration des Domaines and Others* v. *Établissements Sidney-Merlin and Others*).

Jurisdiction—Exemptions from—Immunity of Sovereign Government—The Law of India.

See p. 91 (*Lakhmi Chand* v. *Punjab State*).

(d) FOREIGN ARMED FORCES

Jurisdiction—Exemptions from—Foreign Armed Forces—Crimes Committed by Members of—Employees of United States Armed Forces in France.

UNITED STATES *v.* WEIMAN AND CZERTOK.

United States, Court of Military Appeals. August 21, 1953.

THE FACTS.—Weiman and Czertok, who were nationals of Poland, were civilian members of a United States Labour Service Company, which had been recruited in the American Zone of Occupation in Germany and had subsequently been brought to France for duty with the United States forces stationed there. They were tried by a United States court-martial in France on charges of larceny of government property and wrongful sale thereof in violation of the Uniform Code of Military Justice. Both were found guilty of larceny, and the accused Czertok also of wrongful sale. The accused petitioned for review.

Held: that the decision of the Board of Review, affirming the decision of the court-martial, must be affirmed. Neither customary nor conventional international law prohibited the trial of the accused by a United States court-martial.

The Court said: " The right of a nation to exercise authority over its forces while in a friendly foreign nation was early recognized by the United States Supreme Court. In *The Schooner Exchange* v. *M'Faddon and Others*, 11 US 116, 3 L.Ed 287, Chief Justice Marshall, announcing the lack of jurisdiction of American courts over a French warship granted the right of passage in an American harbor, declared:

> ' In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable and would be withdrawn from the control of the sovereign whose power and whose safety might greatly depend on retaining the exclusive command and disposition of this force. The grant of free passage therefore implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline and to inflict those punishments which the government of his army may require.'

In *Coleman* v. *Tennessee*, 97 US 509, 515, 24 L ed 1118, the Supreme Court declared:

> ' It is well settled that a foreign army, permitted to march through a friendly country or to be stationed in it, by permission of its government or sovereign, is exempt from the civil and criminal jurisdiction of the place. The sovereign is understood . . . to cede a portion of his territorial jurisdiction when he allows the troops of a foreign prince to pass through his dominions. . . . .'

The doctrine of these cases has been approved in *Dow* v. *Johnson*, 100 US 158, 165, 25 L ed 632; and *Tucker* v. *Alexandroff*, 183 US 424, 433, 46 L ed 224, 22 S Ct 195. The decided weight of authority in international law supports this position. King, Jurisdiction Over Friendly Foreign Armed Forces, 36 American Journal of International Law 539; Idem, 40 American Journal of International Law 257; Barton, Foreign Armed Forces, 26 British Year Book of International Law 380.

" We conclude, therefore, that no principle of international law prohibits the exercise of jurisdiction over the accused.

" There remains then, the problem of determining whether the provisions of any treaty to which the United States is a party prohibits the exercise of jurisdiction over them. We have examined the treaty and agreements existing between the United States and

France respecting the presence of American forces in that country. Since these matters are classified as secret security information, we do not set forth their contents in this opinion. Rather than divest the court-martial of jurisdiction over the accused in this instance, these documents disclose that both parties contemplated the exercise of such jurisdiction by the military authorities of the United States. Thus, we must conclude that there was here an affirmative recognition by both parties of the cession of jurisdiction inherent in the consent of France to the entrance of our forces."

[Reports: 3 U.S.C.M.A. 216; 11 C.M.R. 216.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Visiting Forces—Canadian Soldier in the United Kingdom—Whether a "Public Authority" for Purposes of the Limitation Act—Running-down Case—Limitation Act, 1939—Visiting Forces (British Commonwealth) Act, 1933.

REEVES *v.* DEANE-FREEMAN.

England, Court of Appeal. February 2, 1953.
(Somervell, Birkett and Romer L.JJ.)

THE FACTS.—The plaintiff, whilst riding a motor cycle in London, suffered injury in a collision with a Canadian Army lorry driven by the defendant member of the Canadian armed forces. The defence was that the plaintiff's action was barred by s. 21 of the Limitation Act, 1939, because it had not been brought within 12 months of the accident, the defendant being at the time of the accident engaged in a public duty within the meaning of the section, which provides:

> "No action shall be brought against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority, unless it is commenced before the expiration of the year from the date on which the cause of action accrued: . . . ."

The questions for the Court were, therefore, whether a soldier on duty was entitled to the protection of s. 21 of the Limitation Act, and if yes, whether the protection extended to a member of the Canadian forces.

The Visiting Forces (British Commonwealth) Act, 1933, s. 2 (3), provides:

> "Subject as hereinafter provided, any enactment . . . which (a) exempts, or provides for the exemption of, any vessel, vehicle, aircraft, machine or apparatus of, or employed for the purposes of, the home forces or any of them from the operation of any enactment; or (b) in virtue of a connection with home forces or any of them, confers a privilege or immunity on any person . . . shall, with any necessary

modifications, apply in relation to a visiting force as it would apply in relation to a home force of the like nature to a visiting force."

Lord Goddard C.J. had answered both questions in favour of the defendant. The plaintiff appealed.

Held: that the decision of Lord Goddard must be affirmed. The combined effect of s. 21 of the Limitation Act, 1939, and the Visiting Forces (British Commonwealth) Act, 1933, was to bar the claim as being out of time.

Somervell L.J. considered at some length the position of a soldier on duty and concluded that he came within s. 21 of the Limitation Act. Turning then to the position of visiting forces, he said: " With regard to the second point, the question whether the Act does not apply because the defendant here was a Canadian soldier, the Lord Chief Justice regarded that as having to be decided in the defendant's favour by reason of section 2 (3) of the Visiting Forces (British Commonwealth) Act, 1933. Mr. Vester, in his approach to the construction of that section, submitted that apart from that Act, and having regard to the position of the Canadian forces, the duty could not be one within the Public Authorities Protection Act. We have not to decide that point, but Mr. O'Connor submitted that if visiting forces are here, whether dominion or, as in war, foreign forces, *prima facie* at any rate it would be proper to regard them, when carrying out military duties, as fulfilling a duty within the Act. As I have said, we have not to decide the point, and it may be that if it were argued out difficult questions might well arise. The only relevance, I think, is this: If there is any ambiguity in the Act which we have to construe, is it the type of protection which one might well expect to be applied by Parliament to visiting forces? I think it is, but, speaking for myself, I think that the words of the Act are plain and, therefore, the question as to the position apart from the Act does not arise. The relevant words are to be found in section 2 (3). [His Lordship read paragraphs (a) and (b) of subsection (3) and continued:] Having regard to the general intention of that subsection, to be gathered from its terms and the generality of the words used, I think that the Lord Chief Justice was right in saying that the Public Authorities Protection Act was an enactment which fell to be applied to a visiting force as it would apply to a home force of a like nature to the visiting force.

" In those circumstances, I think that point also fails, and I would dismiss the appeal."

Birkett L.J., on the same point, said: " With regard to his point that the defendant, being a Canadian soldier, is not protected, I think the Visiting Forces (British Commonwealth) Act, 1933, particularly in section 2 (3), completely covers that point. I think the words 'Subject as hereinafter provided, any enactment'—specifying some—'or any other statute which . . . (b) in virtue of a connexion with the home forces or any of them, confers a privilege or immunity on any person . . . shall . . . apply in relation to a visiting force as it would apply in relation to a home force of a like nature to the visiting force ' must mean what the Lord Chief Justice said they meant. In ordinary common English the section was really seeking to say this: if you find in any particular statute something which to a United Kingdom soldier gives a privilege or an immunity, then that shall apply with equal force to a Canadian soldier who is a member of the Canadian Army visiting the United Kingdom. I cannot think that it can mean anything else. I think that the point taken upon that matter by Mr. Vester also fails.

" For these reasons I agree with the judgment which has just been delivered by my Lord."

Romer L.J., on the same points, said: " That is all I would like to add, except for one word on the Canadian Army question, that is to say, whether the defendant here is disqualified because he is in the Canadian Army and not in the British Army. I should like to say, with my Lord, that that point must be regarded as left open by our decision. It is not necessary to decide it because I quite agree with what has been said as to the interpretation of section 2 (3) of the Visiting Forces (British Commonwealth) Act, 1933; and indeed the point might well give rise to questions of fact whether a member of one of the Dominion Forces did qualify for protection or not, depending in some cases upon the circumstances and the reasons why his unit was stationed in this country. Matters of that kind might have to be inquired into, and for my part I agree that that question, which was not debated elaborately before us, should be left at large.

" I agree that the appeal fails."

[Report: [1953] 1 Q.B. 459.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Visiting Forces—Exercise of Jurisdiction over Members of—North Atlantic Treaty—Priority of Jurisdiction Vested in Sending State—No Waiver in Favour of Receiving State—Whether Sending State Obliged to Exercise Jurisdiction over Criminal Offence Committed by Member of its Armed Forces.

Re GADOIS DECEASED.

France, Court of Appeal of Paris (*Chambre des mises en accusation*). *December* 14, 1953.

THE FACTS.—On March 18, 1952, the deceased was killed as a result of the alleged negligence of the driver of a United States army lorry. The driver was a corporal serving in the United States armed forces stationed in France, and the accident occurred while he was on duty. The North Atlantic Treaty (of June 19, 1951) provides in

Article VII (1) that the sending State shall have criminal jurisdiction over all persons subject to its military law, and that the receiving State shall have jurisdiction over members of the forces of the sending State " with respect to offences committed within the territory of the receiving State and punishable by the law of that State ". With regard to cases where there is a concurrent right of both States to exercise jurisdiction, Article VII (3) of the Treaty provides that the military authorities of the sending State shall have the primary right to exercise jurisdiction over members of its own forces in respect, *inter alia*, of offences committed in the performance of official duties. It is only where the sending State waives its primary right that the receiving State is entitled to exercise jurisdiction. In the present case the United States forces informed the French authorities that as the corporal had been on duty when the accident occurred, they were not willing to waive their right of jurisdictional priority. The plaintiff, who had been divorced from the deceased since before the latter's death and who was now acting on behalf of the child of the marriage, contended that the American corporal was guilty of " involuntary homicide " according to French law and that she was entitled to claim damages on behalf of the child in the course of criminal proceedings in France (a procedure normally permissible under French law), unless it could be shown whether or not the offence concerned was an offence punishable by American law, and if yes, that an American court was actually exercising jurisdiction in the matter.

Held: that the right of the United States authorities to claim priority of jurisdiction in accordance with the provisions of the North Atlantic Treaty could not be made subject to any additional requirements, and that as the United States authorities had notified the French Court that they did not desire to waive their primary right of jurisdiction, the claim must be dismissed.

The Court said: " The plaintiff contends that the application [of the Public Prosecutor] that the Court should decline to exercise jurisdiction can succeed only if it is shown that the offence is punishable by the law of the State to which the corporal belongs and that an American court is exercising jurisdiction in the matter. It is argued that in the absence of such information the application must simply be refused, and that there is no need to defer that decision until such time as additional information may be received from the Ministry for Foreign Affairs. The Treaty does not provide that an application of this kind is subject to any special condition other than that the sending State shall not have waived its primary right of jurisdiction . . . In this case the American authorities insist on the exercise of their right of priority, and there are no other conditions that can be attached to the exercise of that right; in particular, it cannot be argued that an American court must already be exercising jurisdiction over a prosecution for manslaughter [' involuntary homicide ']. For these reasons the Court declares itself not competent to deal with this matter, the right of jurisdiction being vested in the American military authorities in the exercise of their right of priority of jurisdiction."

[Report: *Clunet*, 81 (1954), p. 736.]

Jurisdiction—Exemptions from—Foreign Armed Forces—Belligerent Occupation.

See p. 634 (*Belgian State* v. *Botte*).

II.—Personal

i.—Over Nationals in Respect of Crimes Committed Abroad

Jurisdiction—Over Nationals for Offences Committed Abroad—Territorial Limits of—Alien Killed Abroad by British Soldier—Power of Court-Martial to Try for Murder—The King's Peace—Offences against the Person Act, 1861—Army Act, 1881.

R. *v.* PAGE.

England, Courts-Martial Appeal Court. November 10, 1953.
(Lord Goddard C.J., Havers and Glyn-Jones JJ.)

THE FACTS.—The appellant, a serving British soldier stationed in the Suez Canal Zone, was convicted by a general court-martial assembled at Fayid in the Suez Canal Zone, of the murder of an Egyptian national in an Egyptian village. He was sentenced to death but the confirming officer commuted the sentence to one of imprisonment. Leave to appeal against the conviction was granted on a question of law, namely, whether a court-martial had jurisdiction to try the appellant when the person killed was not within the Queen's peace. Counsel for the appellant conceded that in like circumstances the killing would have justified a verdict of murder had the appellant been tried before an English court.

Held: that the appeal must be dismissed. Under s. 41 of the Army Act a court-martial could try a person subject to military law for any offence, wherever committed, which would be an offence against the law of England.

Lord Goddard C.J. read the following judgment: " The appellant, an acting corporal in the Royal Corps of Signals, was tried and convicted by a General Court-Martial assembled in Fayid, in the Suez Canal Zone, for the murder in an Egyptian village of an Egyptian national. He was sentenced to death and the sentence was commuted by the confirming officer to one of imprisonment. There was abundant evidence to justify the conviction, and the summing-up of the judge-advocate is not open to criticism, apart from his citation of a passage in the Manual of Military Law which we will consider later in this judgment. The appellant was granted leave to appeal by a single judge of this court on a question of law, namely, that the conviction could not stand for the reason that the murdered man was not within the Queen's peace. The argument submitted by Mr. Diplock on his behalf was that the common law definition of murder is that stated in Coke's Institutes, Third Part, chapter 7, p. 47, where he said: 'Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the king's peace, with malice fore-thought . . .' He contended that a court-martial could only try a case of murder if it came within this common law definition, and could not try one in which recourse had to be made to statutory provisions which had made murder committed abroad triable and punishable in this country.

"As will be seen hereafter, the case really depends on the true construction of section 41 of the Army Act. In view of the fact that section 9 of the Offences against the Person Act, 1861, provides that where any murder is committed by any subject of Her Majesty on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed is the subject of Her Majesty or not, then the offence may be dealt with in all respects as if it had been committed in England in any county or place where the suspected person is apprehended or is in custody, it is not strictly necessary for the purposes of this case to consider the old law on the subject. All that it is necessary to ascertain is whether the law as now laid down in that section can be applied by a court-martial. In deference, however, to Mr. Diplock's learned and careful argument we will consider shortly the position as it was before that statute.

"It is no doubt true that the general rule of English law is that offences committed by British subjects out of England are not punishable by the criminal law of this country. We need not explore the origin of this doctrine. Suffice it to say that it depends partly on the law of nations, which would regard an offence committed on the soil of one nation as at least primarily the concern of the sovereign of that country; but one can also see the procedural difficulty which would have occurred to a medieval lawyer who would be unable to understand how the jury consisting of persons taken from the vicinage could have knowledge of crimes committed abroad sufficient to present them to the sovereign's courts. It is enough to say that certainly from the reign of Henry VIII this rule has been subject to statutory exceptions. Crimes of the present day which, though committed abroad, can be tried in England, are treason, homicide, bigamy and offences against the Foreign Enlistment Act, and there may be others, but these instances will suffice.

"The first Act concerning a crime committed abroad was, we believe, 33 Hen. 8, c. 23. This enabled persons charged with treason or murder to be tried in any country in whatsoever shire or place within the King's dominions or without the offence was considered to be committed. It is curious that although Coke in his definition speaks of a killing within any county of the realm he makes no mention of this statute. We can find no reference to the Act in the chapter on murder, or any observations about the possibility of trying a person in this country for a murder committed abroad. In our opinion this lends considerable force to the view which has often been advanced in arguments in cases on this subject, and by some text writers, that his reference to the King's peace in his definition is meant only to except from murder killing in the course of war and, possibly, rebellion.

"That Act was considered in *Rex* v. *Sawyer*, Russ. & Ry. 294, but a much fuller report appears in a note to *Reg.* v. *Serva* (1845) 2 C. & K. 53, 101. The prisoner there was indicted for the murder of a woman in Portugal who was said to have been 'in the peace of our God and our Sovereign Lord the King'. The argument which took place was on the sufficiency of the indictment, which it was said should have contained an averment that both the prisoner and the victim were British subjects. The case was reserved for the consideration of the 12 judges, and in delivering their opinion Le Blanc J. said: 2 C. & K. 113, 'As to the second objection, that it is not alleged that they were British subjects, the statute 33 Hen. 8, c. 23, nowhere requires that; but, taking it that the jurisdiction only extended to British subjects, the judges are of opinion that sufficient is stated on the indictment to put the other party on shewing the contrary. It states the deceased to be in the peace of our Lord the King, and that the offence was against his peace.' But it is to be observed that they gave no opinion whether if the deceased had not been a British subject the conviction would have been bad, though it seems that their view was to the contrary by the reference to the statute of Henry VIII. It is also to be observed that in the course of the argument Lord Ellenborough said: '"Against the peace of the King" applies to the offender: it relates to his capacity to commit the crime.' That, of course, is entirely intelligible. Nobody would suggest that an English court could try an alien for an offence not committed on British soil.

"That case was heard in 1815, and in 1828 was passed the Offences against the Person Act of that year, which provided for the 'trial of any of His Majesty's subjects charged in England with murder committed on land out of the United Kingdom whether within the King's Dominions or without.' Now it is true that in *Rex* v. *Helsham* (1830) 4 C. & P. 394, Bayley J., after conferring with Bosanquet J., directed an allegation that the prisoner and the deceased were subjects of His Majesty to be inserted in the bill. There was no judgment as to the necessity of the allegation that the deceased was a

British subject, and the note of the summing-up only shows that it was left to the jury to say whether they were satisfied that the prisoner was a British born subject. On the other hand, in 1843 in *Reg.* v. *Azzopardi*, 1 C. & K. 203, the prisoner, a British subject being a native of Malta, murdered a Dutch woman in Smyrna. He was tried in this country and the objection was taken that the victim was a foreigner, but the conviction was affirmed. It was no doubt to allay any doubts that there may have been on this subject that section 9 of the Offences against the Person Act, 1861, is in the wide terms to which we have already referred. It is therefore abundantly clear—and, indeed, Mr. Diplock admitted—that had the appellant been brought to this country and tried here the question as to the nationality of the victim could not have arisen. We have no doubt that when the word 'murder' is found in a statute it has the meaning which has always been attached to it throughout the ages, namely, an unlawful killing with malice aforethought.

"Section 41 of the Army Act is in these terms. [His Lordship read the section and continued:] The object of this proviso to the section and, indeed, of the regulations as mentioned in the first part of the section, is to ensure that persons charged with these grave offences shall be tried when possible by a civil court and not by a court-martial. It is to prevent any conflict of jurisdiction between civil and military courts. In our opinion the plain meaning of the section is that a court-martial can try a person subject to military law for any offence wherever committed, which would be an offence against the law of England, subject only to this, that the section provides for the trial of the prisoner before a civil court instead of a court-martial in the circumstances set out in the section and regulations.

"Our attention has been called to passages in chapter 6 of the Manual of Military Law, pp. 131–132 of the 1951 edition. It is there stated that it must be proved in the case of murder that the victim was under the Queen's peace and that the Army carries the Queen's peace with it wherever it goes. So far as this may appear to assert that an alien who is not at the time of the crime within Her Majesty's dominions or territories is within her peace we cannot assent to it, at least unless the territory has been effectively occupied by her forces. Nevertheless, the legislation to which we have referred enables a subject of Her Majesty to be tried and punished in the courts of this country or, if subject to military law, by a court-martial abroad, for murder whoever the victim and wherever committed. Coke's definition of murder applies to those cases which were triable in the common law courts of his day, namely, where murder was committed within the realm, though we have already pointed out that that very learned person had strangely enough omitted to notice the statute of Henry VIII."

[Report: [1953], 3 W.L.R. 895.]

Jurisdiction—Criminal—Over Nationals—Territorial Limits of Jurisdiction—Crimes Committed Abroad—Whether an Offence to Purchase Cattle Knowing them to have been Stolen Abroad—The Law of South Africa.

R. *v*. Nel.

South Africa, Supreme Court, Appellate Division. April 1, 1953.
(Greenberg, Schreiner, van den Heever, Hoexter and Fagan JJ.A.)

The Facts.—Nel was convicted in a South African Magistrate's Court on nine counts of contravening s. 2 of the Stock Theft Act. The relevant provisions read:

> " A person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen stock or stolen produce without having reasonable cause, proof of which shall be on such first mentioned person, for believing at the time of such acquisition or receipt, that such stock or produce was the property of the person from whom he received it or that such person was duly authorised by the owner thereof to deal with or dispose of it shall be guilty of an offence."

He appealed against his conviction to the Transvaal Provincial Division of the Supreme Court on the ground, *inter alia*, that the cattle had been stolen in Rhodesia, beyond the borders of the Union, and therefore the Act invoked had no application to the present circumstances, as the criminal jurisdiction of a State is strictly territorial in its operation. The appeal was dismissed, but leave was granted to take the case to the Appellate Division of the Supreme Court. Nel again put forward the same argument.

Held: that the appeal should be dismissed. It was assumed that as a general rule the criminal jurisdiction of a State is purely territorial in its operation; but Nel was guilty of an offence committed within the Union itself, namely, the purchase of stock which he knew to be stolen. The place where the theft had been committed was irrelevant to the actual charge brought against the accused.

The Court said (*per* Greenberg J.A.): " It was clear from the evidence and was admitted by the appellant that in each of the counts (a) the cattle concerned were acquired by him otherwise than at a public sale, (b) that these cattle had been stolen. This cast on the appellant the onus referred to in the section (*supra*) and it was rightly admitted by his counsel that the magistrate had correctly held that, on a balance of probabilities, the onus had not been discharged. But counsel contended that the Act applied only to stock stolen in the Union, that consequently the words ' stolen stock ' in the section meant stock so stolen and that the appellant's acts, therefore, did not fall within the section because the evidence showed it had been stolen in Rhodesia. The argument was based on the general submission that, at any rate in the absence of express provision, the Courts of any State have no jurisdiction in regard to crimes committed outside the borders of such State and that the provisions of the Stock Theft Act showed that it was not intended to apply in any respect to stock stolen outside the Union. Counsel conceded that if stock is so stolen by an accused person and brought into the Union by that person, he falls within the provisions of the Act because theft is a continuous offence (*R.* v. *von Elling* (1945 A.D. 234) and the accused in such a case would be stealing within the Union; but counsel contended that this doctrine would not apply in this case where the only transaction proved against the appellant was that he had bought the cattle in the Union. I am prepared to assume that the general submission put forward by counsel is well-founded, but this in itself would not avail the appellant as the act, *viz.*, the purchase of the cattle, on which his conviction was founded, took place within the Union . . . There is no warrant for holding that the words ' stolen stock ' mean stock stolen in the Union or that they mean anything more than stock which, according to our law, is stolen stock . . . The appellant . . . was therefore rightly convicted."

[Report: 1953 (2) S.A. 619 [A.D.].]

Jurisdiction—Personal—Nationals within Foreign Military Base —Persons Subject to Jurisdiction of Foreign Military Courts— Effect of Bases Agreement—Primary Jurisdiction of Foreign State —Jurisdiction of Philippine Courts over Offences Committed on United States Bases—Rights of Individuals under the Agreement.

See p. 148 (*The People of the Philippines* v. *Segundo M. Acierto*).

ii.—Over Nationals Abroad or on the High Seas and their Property Abroad

Jurisdiction—Personal—Property of Nationals Abroad—Nationalization Decree—Effect of—Enforceability in Territorial Waters of Foreign State—Recognition of Incorporation of a State in Territory of Foreign State—Recognition of Lithuanian Government—The Law of the United States of America.

LATVIAN STATE CARGO AND PASSENGER STEAMSHIP LINE *ET AL.* *v.* THE UNITED STATES.

United States, Court of Claims. December 1, 1953.

THE FACTS.—The plaintiff, a State-owned corporation established by a decree of the Council of People's Commissars of the Union of Soviet Socialist Republics, brought this action to recover compensation for the steamship *Denny*, which had been requisitioned by the United States on June 1, 1942. The plaintiff contended that at the time of requisition it had title to the vessel by a decree of the Council of People's Commissars of the Soviet Socialist Republic of Lithuania, which nationalized all vessels such as the one involved in this action and authorized the payment of twenty-five per cent. of the value of such vessels to the owners thereof. Immediately prior to the date of the claimed ownership by the plaintiff, the ship was admittedly owned by a Lithuanian corporation, Lithuanian Baltic-Lloyd, Ltd., which intervened in this action.

On the intervenor's motion to dismiss the plaintiff's petition,

Held: that the plaintiff was not entitled to recover and that its petition must be dismissed. The United States had refused to recognize the incorporation of Lithuania into the Union of Soviet Socialist Republics. The United States did not recognize the validity of decrees resulting from this annexation, and the decrees would, in any event, not be given application to property which was outside that territory at the date of the annexation and of the issuance of the decrees.

" The Court said: " Plaintiff's claim of title, therefore, rests upon the credit to be accorded these decrees by the courts of this country . . . Plaintiff . . . is not entitled to recover unless we are prepared to hold that these acts are to be accorded full faith and credit in the courts of this country.

" The Executive Department of our Government has refused to recognize the incorporation of Lithuania into the Union of Soviet Socialist Republics and has refused to recognize the validity of any decrees issued by the Union of Soviet Socialist Republics or of the People's Commissars of Soviet Socialist Republic of Lithuania relative to persons and property within the territory of Lithuania. That action having been taken by the Executive Department of our Government, the courts have also uniformly refused to recognize the validity of such decrees. For example, see *The Maret*, 145 F. 2d 431, 443[1]; *Latvian State Cargo & Passenger S. S. Line* v. *McGrath*, 188 F. 2d 1000[2]; *The Florida*, 133 F. 2d 719. We fully concur in these opinions.

" Moreover, at the time of the promulgation of the decrees in question, the steamship *Denny* was in the port of New Jersey, United States of America. Whatever validity may be accorded to such acts and decrees as to property within the territory of the country annexed, no court has ever accorded validity to them as to property outside of such territory at the time of the annexation and the decrees.

" For decisions of foreign courts see *Irish Law Times Report*, Vol. LXXV, 153[3]; the decision of the Supreme Court of Canada in *Laane and Baltser* v. *Estonian State Cargo and Passenger Steamship Line* (1949) 2 D.L.R. 641[4]; *Lecouturier* v. *Rey* (1910) A. C. 262, 265.

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[1] See *Annual Digest*, 1943–1945, Case No. 9.]
[2] See *International Law Reports*, 1951, p. 61.]
[3] *The Ramava*: *Annual Digest*, 1941–1942, Case No. 20.]
[4] See *Annual Digest*, 1948, Case No. 50.]

"See also the decision of our Supreme Court in *Baglin* v. *Cusenier*, 221 U. S. 580."

[Reports: 126 Ct. Cl. 802; 116 F. Supp. 717.]

NOTE.—In *Estonian State Cargo and Passenger Steamship Line et Al.* v. *United States*, 126 Ct. Cl. 809, 116 F. Supp. 447 (1953), an action for the requisitioning of an Estonian vessel which had been nationalized by the Estonian Government after Estonia had been incorporated into Russia, the Court of Claims reached the same result on similar facts.

Jurisdiction—Over Nationals Abroad, on Board Foreign Vessels, or in Service of Foreign Companies.

See p. 171 (*Master Amiruzzaman and Others* v. *The Crown*).

Jurisdiction—Over Nationals Abroad—In Ceded Territory Still Occupied by Ceding State—Duty to Maintain Order—The Law of India.

See p. 145 (*Gudder Singh and Another* v. *The State*).

B—EXTRATERRITORIAL JURISDICTION:

CONSULAR JURISDICTION. RÉGIME OF CAPITULATIONS

Extraterritorial Jurisdiction—Consular Jurisdiction—Greek Consular Courts in Egypt—Appeals—Court of Appeal of Athens as Superior Consular Court—Convention of Montreux, 1937—Termination of Capitulations—Transitional Provisions—Pending Actions.

CONSULAR COURTS (APPEALS) CASE.

Greece, Court of Cassation. 1953.

THE FACTS.—This was a further appeal from a judgment of the Court of Appeal of Athens dismissing an appeal from a judgment of the Greek Consular Court of Alexandria in a case concerning the succession to the estate of the deceased. The grounds of the further appeal were that the Court of Appeal had no jurisdiction to hear the original appeal, which had been lodged in July 1949.

Held: that the further appeal must be dismissed. The Court of Appeal of Athens had had jurisdiction to hear the appeal from the Consular Court.

The Court said: "On a true construction of the last paragraph of Article 9[1] of the Convention of Montreux of 1937 relative to the abolition of the system of capitulations in Egypt (ratified by Law No. 755 of 1937)—as appears clearly from the terms of the said paragraph and from its proximity to the connected provisions of the first paragraph of the same Article, as well as from Article 8[1] of the Convention—the only actions which were, as from October 14, 1949, transferred to the Egyptian national courts were those which were at that date pending in the Consular Courts in Egypt, such as the Greek Consular Court of Alexandria. Those cases were not transferred which had on the date mentioned already been referred, by way of appeal, to superior courts (*du second degré*) established and sitting in a foreign country, such as the Court of Athens to which appeals against judgments of Consular Courts had been allocated by Articles 141 tó 147 of the (codified) Law No. 4952 of 1931 on the organization of the central diplomatic and consular service of the Ministry of Foreign Affairs. As the said provisions of the Montreux Convention refer expressly to Consular Courts in Egypt and to actions pending before them, they could not in any way apply to the Court of Appeal of Athens, which cannot be regarded as a superior consular court established and sitting in Egypt. Nor can they apply to actions which have been referred to the said Court of Appeal by way of appeal from judgments given by the Greek Consular Court of Alexandria. Indeed, the judicial process which is commenced by an appeal is not merely a continuation of that which was presented at first instance before the Greek Consular Tribunal: it is a new process, a *novum judicium*, a process on appeal, which may, within certain limits, include new matter. The Court of Appeal, in so holding and in rejecting the plea of the appellant that it was without jurisdiction to hear an appeal from the Greek Consular Tribunal of Alexandria filed four whole months before October 14, 1949, did not infringe the provisions of the Law of 1931, cited above, which, together with the provisions of the Montreux Convention also cited above, established its jurisdiction. On the contrary, the Court of Appeal correctly interpreted and applied those provisions, rightly holding that it had jurisdiction and competence to decide the appeal in question."

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[1] Article 9 of the Montreux Convention provides (in part):

"Any of the High Contracting Parties who possess at present Consular Courts in Egypt, may retain such Courts for the purposes of jurisdiction in matters of personal status in all cases in which the law applicable is the national law of the High Contracting Party concerned . . .

"No Consular Court shall be maintained after the 14th October 1949. On that date all proceedings pending before the said Consular Courts shall be remitted to the National Tribunals at the stage they have then reached."

The Court of Cassation also rejected, because it had not been put forward in the Court of Appeal of Athens, another ground of appeal, namely, that the present action, a *petition d'hérédité* (claiming the rights of an heir) was not included among proceedings relating to personal status, the jurisdiction in respect of which had been retained by the Consular Courts under Article 9 of the Convention of Montreux, read with the Preamble to the Convention and Article 28 of the *Règlement d'Organisation judiciaire* annexed thereto, which gave Consular Courts in Egypt jurisdiction in actions concerning successions, wills, and other like matters. A ground of appeal could only be put forward for the first time in the Court of Cassation if it related to the public interest (*l'ordre public*), that is, the infringement of a law enacted for a high social purpose (*un but social supérieur*). The infringement of the last-mentioned provisions of the Convention of Montreux did not come within that category.

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[1] Article 8 provides:

"Subject to the provisions of Article 9, no civil or commercial action, no action in matters of personal status and no criminal cause shall be instituted before any Consular Court in Egypt after the 15th October 1937.

"Proceedings already brought prior to the above date in any such courts shall be continued before them until finally disposed of, unless they are remitted to the Mixed Tribunals under the conditions specified in Article 53 of the *Règlement d'Organisation judiciaire.*"

[Report: *Revue Hellénique de Droit International*, 7 (1954), p. 279.]

C—HIGH SEAS

I.—Conception of the High Seas and of the Freedom of the Sea

High Seas—Conception of—International Maritime Law.

See *infra* (*Lauritzen* v. *Larsen*).

E—MISCELLANEOUS

Jurisdiction—Miscellaneous—Exterritorial Effects of Legislation—Statute Giving Right of Action to Seamen Suffering Personal Injuries in the Course of Their Employment—Action by Foreign Seaman Against Foreign Shipowner for Injury Sustained in Foreign Port—International Maritime Law—The Law of the Flag—Interpretation of Statute Consistently with International Law—The Law of the United States of America.

LAURITZEN *v.* LARSEN.

United States, Supreme Court. May 25, 1953.

(Vinson C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Minton JJ.)

THE FACTS.—Larsen, a Danish seaman, while temporarily in New York joined the crew of the *Randa*, a ship of Danish flag and registry, owned by the defendant, a Danish citizen. Larsen signed ship's articles, written in Danish, providing that the rights of crew members would be governed by Danish law and by the employer's contract with the Danish Seamen's Union, of which Larsen was a member. He was negligently injured aboard the *Randa* in the course of his employment while the vessel was in Havana harbour.

Larsen brought this action under the Jones Act, 41 Stat. 1007, 46 U.S.C. § 688, in the United States District Court for the Southern District of New York. The Statute grants a right of action thereunder to " any seaman who shall suffer personal injury in the course of his employment". The defendant contended that Danish law was applicable and that, under it, Larsen had received all the compensation to which he was entitled. He also contested the Court's jurisdiction. The Court ruled that American rather than Danish law applied, and the jury awarded a further sum as compensation.[1] The Court of Appeals, Second Circuit, affirmed *per curiam* (196 F. 2d 220 (1952)). The defendant petitioned for *certiorari*, which was granted (344 U.S. 810).

Held: that the judgment of the Court below must be reversed and the case remanded to the District Court. The Jones Act could not be interpreted to intervene between foreigners and their own law as regards acts on a foreign ship not in United States waters. Statutes of the United States relating to maritime matters applied only to areas and transactions in which American law would be considered operative under international law, and such statutes must if possible be given a construction which would not bring them into conflict with international law. The international maritime law deals with conflicts between national systems of law by weighing the significance of the connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. In these terms, Denmark had the stronger interest in the protection of the seaman by reason of the law of the flag, the allegiance and domicile of the injured person, the allegiance of the defendant shipowner, and the law of the contract. The seaman's presence in a port of the United States was transitory and created no such national interest in, or duty toward him, as to justify the application of United States law.

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[1] In a footnote to the statement of facts, the Court referred to previous cases in the Court of Appeals for the Second Circuit dealing with the rights of alien seamen. The Court said : " In *The Paula*, 91 F.2d 1001 [*Annual Digest*, 1935–1937, Case No. 78], the then Circuit Court of Appeals, Second Circuit, held the Jones Act inapplicable to a suit by an alien seaman against this same petitioner, and expressly refused to follow dicta by the Fifth Circuit Court of Appeals in *Arthur* v. *Compagnie Générale Transatlantique*, 72 F.2d 662, to the effect that the Act gave a right of action to ' all seamen regardless of nationality.' The *Paula* decision is generally consistent with prior decisions of the court rendering it. See *The Hanna Nielsen*, 273 F. 171; *The Pinar Del Rio*, 16 F. 2d 984, aff'd 277 U.S. 151. A few years later, in *Gambera* v. *Bergoty*, 132 F. 2d 414 [*Annual Digest*, 1941–1942, Case No. 44], that same court granted relief under the Jones Act to a plaintiff who was a long-time resident, though not a citizen, of this country, and who suffered injury in American territorial waters while serving on a Greek ship. In *Kyriakos* v. *Goulandris*, 151 F. 2d 132, the court (over the dissent of Judge Learned Hand) held that the Act applied to injuries sustained while ashore in the United States by a Greek seaman employed by a Greek shipowner. In *O'Neill* v. *Cunard White Star*, 160 F.2d 446, that court held that a British seaman injured on a British vessel on the high seas could not sue under the Jones Act. In *Taylor* v. *Atlantic Maritime Co.*, 179 F. 2d 597, it reversed a district court judgment dismissing a Jones Act suit by a Panamanian citizen, allegedly residing in New York, against a ship of Panamanian registry for injuries apparently received on the high seas. Judge Learned Hand, writing for the court, indicated that a majority of the panel thought that the Jones Act was not applicable to alien seamen, but that ' in spite of what we should hold, were we free ' they were bound by the decision in *Kyriakos*. In the case now before us the court affirmed *per curiam* on the authority of *Kyriakos* and *Taylor*. No two of these cases present exactly the same basis for application of American law and their contrary results do not necessarily mean inconsistency. But they illustrate different considerations which influence choice of law in maritime tort cases."

The Court said (*per* Jackson J.): " The question of jurisdiction is shortly answered. A suit to recover damages under the Jones Act is *in personam* against the ship's owner and not one *in rem* against the ship itself.[1] The defendant appeared generally, answered and tendered no objection to jurisdiction of his person. As frequently happens, a contention that there is some barrier to granting plaintiff's claim is cast in terms of an exception to jurisdiction of subject matter. A cause of action under our law was asserted here, and the court had power to determine whether it was or was not well founded in law and in fact. Cf. *Montana-Dakota Co.* v. *Public Service Co.*, 341 U. S. 246, 249.

" Denmark has enacted a comprehensive code to govern the relations of her shipowners to her seagoing labor which by its terms and intentions controls this claim. Though it is not for us to decide, it is plausibly contended that all obligations of the owner growing out of Danish law have been performed or tendered to this seaman. The shipowner, supported here by the Danish Government, asserts that the Danish law supplies the full measure of his obligation and that maritime usage and international law as accepted by the United States exclude the application of our incompatible statute.

" That allowance of an additional remedy under our Jones Act would sharply conflict with the policy and letter of Danish law is plain from a general comparison of the two systems of dealing with shipboard accidents. Both assure the ill or injured seafaring worker the conventional maintenance and cure at the shipowner's cost, regardless of fault or negligence on the part of anyone. But, while we limit this to the period within which maximum possible cure can be effected, *Farrell* v. *United States*, 336 U. S. 511,[2] the Danish law limits it to a fixed period of twelve weeks, and the monetary measurement is different. The two systems are in sharpest conflict as to treatment of claims for disability, partial or complete, which are permanent, or which outlast the liability for maintenance and cure, to which class this claim belongs. Such injuries Danish law relieves under a state-operated plan similar to our workmen's compensation systems. Claims for such disability are not made against the owner but against the state's Directorate of Insurance Against the Consequences of Accidents. They may be presented directly or through any Danish Consulate. They are allowed by administrative action, not by litigation, and depend not upon fault or negligence but only on the fact of injury and the extent of disability. Our own law, apart from indemnity for injury caused by the ship's unseaworthiness, makes no such compensation for such disability in the absence of fault or negligence. But, when such fault or negligence is established by litigation, it allows recovery for elements such as pain and suffering not compensated under Danish law and lets the damages be fixed by jury. In this case, since negligence was found, United States law permits a larger recovery than Danish law. If the same injury were sustained but negligence was absent or not provable, the Danish law would appear to provide compensation where ours would not.

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[1] See *Plamals* v. *Pinar Del Rio*, 277 U. S. 151.

[[2] See *Annual Digest*, 1949, Case No. 5, Note.]

" Respondent does not deny that Danish law is applicable to his case. The contention as stated in his brief is rather that ' A claimant may select whatever forum he desires and receive the benefits resulting from such choice ' and ' A ship owner is liable under the laws of the forum where he does business as well as in his own country.' This contention that the Jones Act provides an optional cumulative remedy is not based on any explicit terms of the Act, which makes no provision for cases in which remedies have been obtained or are obtainable under foreign law. Rather he relies upon the literal catholicity of its terminology. If read literally, Congress has conferred an American right of action which requires nothing more than that plaintiff be ' any seaman who shall suffer personal injury in the course of his employment.' It makes no explicit requirement that either the seaman, the employment or the injury have the slightest connection with the United States. Unless some relationship of one or more of these to our national interest is implied, Congress has extended our law and opened our courts to all alien seafaring men injured anywhere in the world in service of watercraft of every foreign nation—a hand on a Chinese junk, never outside Chinese waters, would not be beyond its literal wording.

" But Congress in 1920 wrote these all-comprehending words, not on a clean slate, but as a postscript to a long series of enactments governing shipping. All were enacted with regard to a seasoned body of maritime law developed by the experience of American courts long accustomed to dealing with admiralty problems in reconciling our own with foreign interests and in accommodating the reach of our own laws to those of other maritime nations.

" The shipping laws of the United States, set forth in Title 46 of the United States Code, comprise a patchwork of separate enactments, some tracing far back in our history and many designed for particular emergencies. While some have been specific in application to foreign shipping and others in being confined to American shipping, many give no evidence that Congress addressed itself to their foreign application and are in general terms which leave their application to be judicially determined from context and circumstance. By usage as old as the Nation, such statutes have been construed to apply only to areas and transactions in which American law would be considered operative under prevalent doctrines of international law. Thus, in *United States* v. *Palmer*, 3 Wheat. 610, this Court was called upon to interpret a statute of 1790 (1 Stat. 115) punishing certain acts when committed on the high seas by 'any person or persons,' terms which, as Mr. Chief Justice Marshall observed, are 'broad enough to comprehend every human being.' But the Court determined that the literal universality of the prohibition 'must not only be limited to cases within the jurisdiction of the state, but also to those objects to which the legislature intended to apply them' (p. 631) and therefore would not reach a person performing the proscribed acts aboard the ship of a foreign state on the high seas.

"This doctrine of construction is in accord with the long-heeded admonition of Mr. Chief Justice Marshall that 'an act of congress ought never to be construed to violate the law of nations if any other possible construction remains. . . .' *The Charming Betsy*, 2 Cranch 64, 118. See *The Nereide*, 9 Cranch 388, 423; *MacLeod* v. *United States*, 229 U.S. 416, 434; *Sandberg* v. *McDonald*, 248 U.S. 185, 195. And it has long been accepted in maritime jurisprudence that '. . . if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.' Lord Russell of Killowen in *The Queen* v. *Jameson*, [1896] 2 Q.B. 425, 430. This is not, as sometimes is implied, any impairment of our own sovereignty, or limitation of the power of Congress. 'The law of the sea,' we have had occasion to observe, 'is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States.' *Farrell* v. *United States*, 336 U.S. 511, 517. On the contrary, we are simply dealing with a problem of statutory construction rather commonplace in a federal system by which courts often have to decide whether 'any' or 'every' reaches to the limits of the enacting authority's usual scope or is to be applied to foreign events or transactions.[1]

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[1] Cheatham and Reese, Choice of Applicable Law, 52 Col. L. Rev. 959, 961, dealing with state statutes, puts the problem in this fashion:

"There is one rule or policy which, wherever applicable, takes precedence over others and, to a large extent, saves the courts from further pain of decision. That controlling policy, obvious as it may be, is that a court must follow the dictates of its own legislature to the extent that these are constitutional. But, although choice of law constitutes no exception to this fundamental rule, rarely can the principle be applied in practice. The vast run of statutes are enacted with only the intrastate situation in mind. The application of a statute to out-of-state occurrences, therefore, must generally be determined in accordance with ordinary conflict of laws rules. And this is so even if, as is frequently the case, the statute employs such sweeping terms as 'every contract' or 'every decedent.' Unless it appears that the draftsmen so intended, language of this sort is not to be taken literally to mean that the statute is applicable to every transaction wherever occurring or to every case brought in the forum. Where, on the other hand, it is clear that the legislature has actually addressed itself to the choice of law problem, the courts, subject to the limitation of constitutionality, must give effect to its intentions."

" The history of the statute before us begins with the 1915 enactment of the comprehensive LaFollette Act, entitled, ' An Act To promote the welfare of American seamen in the merchant marine of the United States; to abolish arrest and imprisonment as a penalty for desertion and to secure the abrogation of treaty provisions in relation thereto; and to promote safety at sea.' 38 Stat. 1164. Many sections of this Act were in terms or by obvious implication restricted to American ships.[1] Three sections were made specifically applicable to foreign vessels,[2] and these provoked considerable doubt and debate.[3] Others were phrased in terms which on their face might apply to the world or to anything less. In this category fell § 20, a cryptic paragraph dealing with the fellow-servant doctrine, to which this Court ascribed little, if any, of its intended effect. *Chelentis* v. *Luckenbach S.S. Co.*, 247 U. S. 372. In 1920, Congress, under the title ' An Act To provide for the promotion and maintenance of the American merchant marine. . . .' and other subjects not relevant, provided a plan to aid our mercantile fleet and included the revised provision for injured seamen now before us for construction. 41 Stat. 988, 1007. It did so by reference to the Federal Employers' Liability Act, which we have held not applicable to an American citizen's injury sustained in Canada while in service of an American employer. *New York Central R. Co.* v. *Chisholm*, 268 U.S. 29. And it did not give the seaman the one really effective security for a claim against a foreign owner, a maritime lien.[4]

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[1] Section 1, requiring lost seamen to be replaced, directed the master to report such replacement to the United States consul at the first port at which he shall arrive thereafter. Section 2 provided certain regulations affecting the duties of crew members aboard " all merchant vessels of the United States." Section 5 provided that on complaint of the officers or crew of " any vessel " in a foreign port that the vessel is unseaworthy or inadequately provisioned " the consul " may appoint someone to make inquiry. Section 6 set forth certain sanitation requirements for " merchant vessels of the United States." Section 13 required every vessel to have in its complement a minimum percentage of able-bodied seamen certified by the Secretary of Commerce. Section 19 was concerned with the procedure to be followed before American consuls abroad in certain matters involving American seamen.

[2] § § 4, 11, and 14. Section 4 gave seamen the right to demand certain wage payments on coming into port. Its closing portion provided " . . . this section shall apply to seamen on foreign vessels while in harbors of the United States, and the courts of the United States shall be open to such seamen for its enforcement." Section 11 re-enacted, with some changes, an 1898 statute prohibiting payment of advance wages to seamen; one subsection stated " this section shall apply as well to foreign vessels while in waters of the United States, as to vessels of the United States, and any master, owner, consignee, or agent of any foreign vessel who has violated its provisions shall be liable to the same penalty that the master, owner, or agent of a vessel of the United States would be for similar violation."

For construction of these two sections see *Patterson* v. *Bark Eudora*, 190 U. S. 169; *Sandberg* v. *McDonald*, 248 U. S. 185, and *Strathearn S. S. Co.* v. *Dillon*, 252 U. S. 348 [*Annual Digest*, 1919–1922, Case No. 72].

Section 14 directed that certain requirements concerning lifeboats should also be applicable to foreign vessels leaving United States ports.

[3] See Report of the House Committee on Merchant Marine and Fisheries, H. R. Rep. No. 852, 63d Cong., 2d Sess., pp. 18, 20; 50 Cong. Rec. 5761–5792..

[4] *Plamals* v. *Pinar Del Rio*, 277 U.S. 151.

"Congress could not have been unaware of the necessity of construction imposed upon courts by such generality of language and was well warned that in the absence of more definite directions than are contained in the Jones Act it would be applied by the courts to foreign events, foreign ships and foreign seamen only in accordance with the usual doctrine and practices of maritime law.

"Respondent places great stress upon the assertion that petitioner's commerce and contacts with the ports of the United States are frequent and regular, as the basis for applying our statutes to incidents aboard his ships. But the virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea. Hence, courts of this and other commercial nations have generally deferred to a non-national or international maritime law of impressive maturity and universality.[1] It has the force of law, not from extraterritorial reach of national laws, nor from abdication of its sovereign powers by any nation, but from acceptance by common consent of civilized communities of rules designed to foster amicable and workable commercial relations.

"International or maritime law in such matters as this does not seek uniformity and does not purport to restrict any nation from making and altering its laws to govern its own shipping and territory. However, it aims at stability and order through usages which considerations of comity, reciprocity and long-range interest have developed to define the domain which each nation will claim as its own. Maritime law, like our municipal law, has attempted to avoid or resolve conflicts between competing laws by ascertaining and valuing points of contact between the transaction and the states or governments whose competing laws are involved. The criteria, in general, appear to be arrived at from weighing of the significance of one or more connecting factors between the shipping transaction regulated and the national interest served by the assertion of authority. It would not be candid to claim that our courts have arrived at satisfactory standards or apply those that they profess with perfect consistency. But in dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction.

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[1] See the famous opinion of Mr. Justice Story in *De Lovio* v. *Boit*, Fed. Cas. No. 3,776, 2 Gall. 398; *The Sally*, 8 Cranch 382 and 2 Cranch 406; *The Scotia*, 14 Wall. 170; Dickinson, The Law of Nations as Part of the National Law of the United States, 101 U. of Pa. L. Rev. 26, 28–29, 792, 803–816.

"In the case before us, two foreign nations can claim some connecting factor with this tort—Denmark, because, among other reasons, the ship and the seaman were Danish nationals; Cuba, because the tortious conduct occurred and caused injury in Cuban waters. The United States may also claim contacts because the seaman had been hired in and was returned to the United States, which also is the state of the forum. We therefore review the several factors which, alone or in combination, are generally conceded to influence choice of law to govern a tort claim, particularly a maritime tort claim, and the weight and significance accorded them.

"I. *Place of the Wrongful Act.*—The solution most commonly accepted as to torts in our municipal and in international law is to apply the law of the place where the acts giving rise to the liability occurred, the *lex loci delicti commissi.*[1] This rule of locality, often applied to maritime torts,[2] would indicate application of the law of Cuba, in whose domain the actionable wrong took place. The test of location of the wrongful act or omission, however sufficient for torts ashore, is of limited application to shipboard torts, because of the varieties of legal authority over waters she may navigate. These range from ports, harbors, roadsteads, straits, rivers and canals which form part of the domain of various states, through bays and gulfs, and that band of the littoral sea known as territorial waters, over which control in a large, but not unlimited, degree is conceded to the adjacent state. It includes, of course, the high seas as to which the law was probably settled and old when Grotius wrote that it cannot be anyone's property and cannot be monopolized by virtue of discovery, occupation, papal grant, prescription or custom.[3]

"We have sometimes uncompromisingly asserted territorial rights, as when we held that foreign ships voluntarily entering our waters become subject to our prohibition laws and other laws as well, except as we may in pursuance of our own policy forego or limit exertion of our power. *Cunard Steamship Co.* v. *Mellon,* 262 U. S. 100, 124.[4] This doctrine would seem to indicate Cuban law for this case. But the territorial standard is so unfitted to an enterprise conducted under many territorial rules and under none that it usually is modified by the more constant law of the flag. This would appear to be consistent with the practice of Cuba, which applies a workmen's compensation system in principle not unlike that of Denmark to all accidents occurring aboard ships of Cuban registry.[1] The locality test, for what it is worth, affords no support for the application of American law in this case and probably refers us to Danish in preference to Cuban law, though this point we need not decide, for neither party urges Cuban law as controlling.

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[1] See *Slater* v. *Mexican National R. Co.,* 194 U. S. 120; *New York Central R. Co.* v. *Chisholm,* 268 U. S. 29; Rheinstein, The Place of Wrong, 19 Tulane L. Rev. 4, 165; cf. *Sandberg* v. *McDonald,* 248 U. S. 185, 195.

[2] *Carr* v. *Fracis Times & Co.,* [1902] A. C. 176; cf. *Uravic* v. *Jarka Co.,* 282 U. S. 234 [*Annual Digest,* 1931–1932, Case No. 80]. See Restatement, Conflict of Laws, § 404.

[3] Grotius, De Jure Praedae, Carnegie Endowment Publication 1950, 207, 220, 222, 223, 231–233, 234, 237. See Dumbauld, Grotius on the Law of Prize, 1 J. Publ. L. 370, 372, 387.

[[4] See *Annual Digest,* 1923–1934, Case No. 57.]

" 2. *Law of the Flag.*—Perhaps the most venerable and universal rule of maritime law relevant to our problem is that which gives cardinal importance to the law of the flag. Each state under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship, thereby accepting responsibility for it and acquiring authority over it. Nationality is evidenced to the world by the ship's papers and its flag. The United States has firmly and successfully maintained that the regularity and validity of a registration can be questioned only by the registering state.[2]

" This Court has said that the law of the flag supersedes the territorial principle, even for purposes of criminal jurisdiction of personnel of a merchant ship, because it ' is deemed to be a part of the territory of that sovereignty [whose flag it flies], and not to lose that character when in navigable waters within the territorial limits of another sovereignty.' On this principle, we concede a territorial government involved only concurrent jurisdiction of offenses aboard our ships. *United States* v. *Flores*, 289 U. S. 137, 155–159,[3] and cases cited. Some authorities reject, as a rather mischievous fiction, the doctrine that a ship is constructively a floating part of the flag-state,[4] but apply the law of the flag on the pragmatic basis that there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the state that owns her.

" It is significant to us here that the weight given to the ensign overbears most other connecting events in determining applicable law. As this Court held in *United States* v. *Flores*, *supra*, at 158, and iterated in *Cunard Steamship Co.* v. *Mellon*, *supra*, at 123:

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[1] See Cuba Workmen's Compensation Law, Decree No. 2687, November 15, 1933, Arts. XI, XL.

[2] The leading case is *The Virginius*, seized in 1873 by the Spanish when en route to Cuba. President Grant took the position that " if the ship's papers were irregular or fraudulent, the crime was committed against the American laws and only its tribunals were competent to decide the question." The Attorney General took the same position. The ship was restored. 2 Moore's Digest 895–903. Higgins and Colombos, International Law of the Sea (2d ed.), 201.

[[3] See *Annual Digest*, 1931–1932, Case No. 91.]

[4] The theoretical basis used by this Court apparently prevailed in 1928 with the Permanent Court of International Justice in the case of *The Lotus*, P. C. I. J., Series A, No. 10 [*Annual Digest*, 1927–1928, Cases No. 2 and 98]. For criticism of it see Higgins and Colombos, International Law of the Sea (2d ed.), 193–195. We leave the controversy where we find it, for either basis leads to the same result in this case, though this might not be so with some other problems of shipping.

> ' And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation or the interests of its commerce should require. . . .'

This was but a repetition of settled American doctrine.[1]

" These considerations are of such weight in favor of Danish and against American law in this case that it must prevail unless some heavy counterweight appears.

" 3. *Allegiance or Domicile of the Injured.*—Until recent times there was little occasion for conflict between the law of the flag and the law of the state of which the seafarer was a subject, for the long-standing rule, as pronounced by this Court after exhaustive review of authority, was that the nationality of the vessel for jurisdictional purposes was attributed to all her crew. *In re Ross*, 140 U. S. 453, 472.[2] Surely during service under a foreign flag some duty of allegiance is due. But, also, each nation has a legitimate interest that its nationals and permanent inhabitants be not maimed or disabled from self-support. In some later American cases, courts have been prompted to apply the Jones Act by the fact that the wrongful act or omission alleged caused injury to an American citizen or domiciliary.[3] We need not, however, weigh the seaman's nationality against that of the ship, for here the two coincide without resort to fiction. Admittedly, respondent is neither citizen nor resident of the United States. While on direct examination he answered leading questions that he was living in New York when he joined the *Randa*, the articles which he signed recited, and on cross-examination he admitted, that his home was Silkeburg, Denmark. His presence in New York was transitory and created no such national interest in, or duty toward, him as to justify intervention of the law of one state on the shipboard of another.

" 4. *Allegiance of the Defendant Shipowner.*—A state ' is not debarred by any rule of international law from governing the conduct of its own citizens upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed.'

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[1] *Wildenhus's Case*, 120 U. S. 1; *Brown* v. *Duchesne*, 19 How. 183. For application of this doctrine in tort cases see *Bonsalem* v. *Byron S. S. Co.*, 50 F. 2d 114; *Cain* v. *Alpha S. S. Corp.*, 35 F. 2d 717; *Grand Trunk R. Co.* v. *Wright*, 21 F. 2d 814; Restatement, Conflict of Laws, § 405.

[2] See also *Rainey* v. *New York & P. S. S. Co.*, 216 F. 449.

[3] See *Uravic* v. *Jarka Co., supra*; *Shorter* v. *Bermuda & West Indies S. S. Co.*, 57 F. 2d 313; *Gambera* v. *Bergoty*, 132 F. 2d 414 [*Annual Digest*, 1941–1942, Case No. 44]. But see *The Oriskany*, 3 F. Supp. 805; *Clark* v. *Montezuma Transportation Co.*, 217 App. Div. 172, 216 N. Y. Supp. 295.

Skiriotes v. *Florida*, 313 U. S. 69, 73.[1] *Steele* v. *Bulova Watch Co.*, 344 U. S. 280, 282. Until recent times this factor was not a frequent occasion of conflict, for the nationality of the ship was that of its owners.[2] But it is common knowledge that in recent years a practice has grown, particularly among American shipowners, to avoid stringent shipping laws by seeking foreign registration eagerly offered by some countries.[3] Confronted with such operations, our courts on occasion have pressed beyond the formalities of more or less nominal foreign registration to enforce against American shipowners the obligations which our law places upon them.[4] But here again the utmost liberality in disregard of formality does not support the application of American law in this case, for it appears beyond doubt that this owner is a Dane by nationality and domicile.

" 5. *Place of Contract.*—Place of contract, which was New York, is the factor on which respondent chiefly relies to invoke American law. It is one which often has significance in choice of law in a contract action. But a Jones Act suit is for tort, in which respect it differs from one to enforce liability for maintenance and cure. As we have said of the latter, ' In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment. Created thus with the contract of employment, the liability, unlike that for indemnity or that later created by the Jones Act, in no sense is predicated on the fault or negligence of the shipowner.' *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730. *De Zon* v. *American President Lines*, 318 U. S. 660, 667; *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 527. But this action does not seek to recover anything due under the contract or damages for its breach.

" The place of contracting in this instance, as is usual to such contracts, was fortuitous. A seaman takes his employment, like his fun, where he finds it; a ship takes on crew in any port where it needs them. The practical effect of making the *lex loci contractus* govern all tort claims during the service would be to subject a ship to a multitude of systems of law, to put some of the crew in a more advantageous position than others, and not unlikely in the long run to diminish hirings in ports of countries that take best care of their seamen.

" But if contract law is nonetheless to be considered, we face the fact that this contract was explicit that the Danish law and the

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[[1] See *Annual Digest*, 1941–1942, Case No. 68.]

[2] Many nations (including both the United States and Denmark) still allow only those ships wholly or predominantly owned by its nationals to register under its flag. See 46 U. S. C. §§ 11, 808; Denmark, Maritime Law of May 7, 1937, § 1.

[3] McFee, The Law of the Sea, 152–154. See Merchant Marine Study and Investigation (Transfer of American Ships to Foreign Registry), Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 81st Cong., 1st Sess.

[4] See *Gerradin* v. *United Fruit Co.*, 60 F. 2d 927; cf. *Central Vermont Co.* v. *Durning*, 294 U. S. 33.

contract with the Danish union were to control. Except as forbidden by some public policy, the tendency of the law is to apply in contract matters the law which the parties intended to apply.[1] We are aware of no public policy that would prevent the parties to this contract, which contemplates performance in a multitude of territorial jurisdictions and on the high seas, from so settling upon the law of the flag-state as their governing code. This arrangement is so natural and compatible with the policy of the law that even in the absence of an express provision it would probably have been implied. *The Belgenland,* 114 U. S. 355, 367; *The Hanna Nielsen,* 273 F. 171. We think a quite different result would follow if the contract attempted to avoid applicable law, for example, so as to apply foreign law to an American ship.

" However, at the same time that he is relying on the place of the contract, respondent attacks the whole contract as void because the articles do not describe the voyage with sufficient definiteness within the rule applied in *The Quoque,* 261 F. 414, aff'd 266 F. 696. This case dealt with an American ship and its holding was founded upon a statute originally enacted in 1873 and held by those courts that have dealt with the problem applicable only to American ships. *The Montapedia,* 14 F. 427; *The Elswick Tower,* 241 F. 706. The contention is without merit.

" We do not think the place of contract is a substantial influence in the choice between competing laws to govern a maritime tort.

" 6. *Inaccessibility of Foreign Forum.*—It is argued, and particularly stressed by an *amicus* brief, that justice requires adjudication under American law to save seamen expense and loss of time in returning to a foreign forum. This might be a persuasive argument for exercising a discretionary jurisdiction to adjudge a controversy; but it is not persuasive as to the law by which it shall be judged. It is pointed out, however, that the statutes of at least one maritime country (Panama) allow suit under its law by injured seamen only in its own courts. The effect of such a provision is doubtful in view of our holding that such venue restrictions by one of the states of the Union will not preclude action in a sister state, *Tennessee Coal, Iron & R. Co.* v. *George,* 233 U. S. 354.

" Confining ourselves to the case in hand, we do not find this seaman disadvantaged in obtaining his remedy under Danish law from being in New York instead of Denmark. The Danish compensation system does not necessitate delayed, prolonged, expensive and uncertain litigation. It is stipulated in this case that claims may be made through the Danish Consulate. There is not the slightest showing that to obtain any relief to which he is entitled under Danish law would require his presence in Denmark or necessitate his leaving New York. And, even if it were so, the record indicates that he was offered and declined free transportation to Denmark by petitioner.

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[1] See Yntema, " Autonomy " in Choice of Law, 1 Am. J. Comp. L. 341.

" 7. *The Law of the Forum.*—It is urged that, since an American forum has perfected its jurisdiction over the parties and defendant does more or less frequent and regular business within the forum state, it should apply its own law to the controversy between them. The ' doing business ' which is enough to warrant service of process may fall quite short of the considerations necessary to bring extraterritorial torts to judgment under our law. Under respondent's contention, all that is necessary to bring a foreign transaction between foreigners in foreign ports under American law is to be able to serve American process on the defendant. We have held it a denial of due process of law when a state of the Union attempts to draw into control of its law otherwise foreign controversies, on slight connections, because it is a forum state. *Hartford Accident & Indemnity Co.* v. *Delta & Pine Land Co.*, 292 U. S. 143; *Home Insurance Co.* v. *Dick*, 281 U. S. 397. The purpose of a conflict-of-laws doctrine is to assure that a case will be treated in the same way under the appropriate law regardless of the fortuitous circumstances which often determine the forum. Jurisdiction of maritime cases in all countries is so wide and the nature of its subject matter so far-flung that there would be no justification for altering the law of a controversy just because local jurisdiction of the parties is obtainable.

" It is pointed out that our statute on limitation of shipowner's liability which formerly applied in terms to ' any vessel ' was applied by our courts to foreign causes.[1] Hence, it is argued by analogy that ' any seaman ' should be construed so to apply. But the situation is inverted. The limitation-of-liability statute was construed to thus apply only against those who had chosen to sue in our courts on foreign transactions.[2] Because a law of the forum is applied to plaintiffs who voluntarily submit themselves to it is no argument for imposing the law of the forum upon those who do not. Furthermore, this application of the limitation on liability brought our practice into harmony with that of all other maritime nations,[1] while the application of the Jones Act here advocated would bring us into conflict with the maritime world.

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[1] *The Scotland*, 105 U. S. 24; *The Titanic*, 233 U. S. 718. At the time these cases were decided the statute purported to apply to " any vessel." In 1936 it was amended so as expressly to apply to foreign, as well as domestic, vessels. 49 Stat. 1479.

[2] " It is true that the act of Congress does not control or profess to control the conduct of a British ship on the high seas. See *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347, 356. It is true that the foundation for a recovery upon a British tort is an obligation created by British law. But it also is true that the laws of the forum may decline altogether to enforce that obligation on the ground that it is contrary to the domestic policy, or may decline to enforce it except within such limits as it may impose. *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473, 478, 480. Dicey, Conflict of Laws, 2d ed., 647. It is competent therefore for Congress to enact that in certain matters belonging to admiralty jurisdiction parties restorting to our courts shall recover only to such extent or in such way as it may mark out. *Butler* v. *Boston & Savannah Steamship Co.*, 130 U. S. 527. The question is not whether the owner of the Titanic by this proceeding can require all claimants to come in and can cut down rights vested under English law, as against, for instance, Englishmen living in England who do not appear. It is only whether those who do see fit to sue in this country are limited in their recovery irrespective of the English law. That they are so limited results in our opinion from the decisions of this court. For on what ground was the limitation of liability allowed in *The Scotland* or *La Bourgogne*? . . . . The

"This review of the connecting factors which either maritime law or our municipal law of conflicts regards as significant in determining the law applicable to a claim of actionable wrong shows an overwhelming preponderance in favor of Danish law. The parties are both Danish subjects, the events took place on a Danish ship, not within our territorial waters. Against these considerations is only the fact that the defendant was served here with process and that the plaintiff signed on in New York, where the defendant was engaged in our foreign commerce. The latter event is offset by provision of his contract that the law of Denmark should govern. We do not question the power of Congress to condition access to our ports by foreign-owned vessels upon submission to any liabilities it may consider good American policy to exact. But we can find no justification for interpreting the Jones Act to intervene between foreigners and their own law because of acts on a foreign ship not in our waters.

"In apparent recognition of the weakness of the legal argument, a candid and brash appeal is made by respondent and by *amicus* briefs to extend the law to this situation as a means of benefiting seamen and enhancing the costs of foreign ship operation for the competitive advantage of our own. We are not sure that the interest of this foreign seaman, who is able to prove negligence, is the interest of all seamen or that his interest is that of the United States. Nor do we stop to inquire which law does whom the greater or the lesser good. The argument is misaddressed. It would be within the proprieties if addressed to Congress. Counsel familiar with the traditional attitude of this Court in maritime matters could not have intended it for us.[2]"

(Black J. agreed with the Court of Appeals and would have affirmed its judgment.)

[Reports: 345 U. S. 571; 97 L.Ed. 1254; 73 Sup. Ct. 921.]

The above case is noted in *University of Pennsylvania Law Review*, 102 (1953), p. 237, and in *Virginia Law Review*, 39 (1953), p. 829.

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essential point was that the limitation might be applied to foreign ships if sued in this country although they were not subject to our substantive law." *The Titanic, supra*, at 732–733 (per Holmes, J.).

[1] Limitation of liability has been an essential part of the maritime law of every maritime nation since the *Grand Ordonnance* of Louis XIV in 1681. See discussion in the opinion of Mr. Justice Brown in *The Main* v. *Williams*, 152 U. S. 122.

[2] Cf. *The Peterhoff*, 5 Wall. 28, 57: "In cases such as that now in judgment, we administer the public law of nations, and are not at liberty to inquire what is for the particular advantage or disadvantage of our own or another country."

PART V

STATE RESPONSIBILITY

A—NATURE AND KINDS OF STATE RESPONSIBILITY

IV.—For Debts

State Responsibility—For Debts—Devaluation of Private Debt Obligations—Whether Involving State Responsibility.

TABAR CLAIM (NO. 1).

United States, International Claims Commission.[1, 2]

THE FACTS.—Before the outbreak of the Second World War, the claimants had deposited a sum of dinars in a Yugoslav bank. By the Law on the Settlement of Pre-War Obligations, which came into force on November 13, 1945, it was provided that pre-war obligations, *i.e.*, those incurred prior to April 18, 1941, should be settled in old Yugoslav dinars. (Between the liberation of Yugoslavia in 1945 and the passing of this Law, five different Laws had been passed dealing with exchange rates for, *inter alia*, the settlement of obligations.) Article 1 of the Law of 1945 provided that such obligations should be settled at the rate of 10 old Yugoslav dinars to one dinar of Democratic Federative Yugoslavia.

The claimants contended that the loss of 90 per cent. of the value of their deposits constituted a " taking " of their property, or rights or interests in property, within the meaning of Article 1 (a) of the Yugoslav Claims Agreement of 1948.

Held: that the claim must fail. The operation of the Yugoslav Law of 1945 did not constitute a " nationalization or taking " of property within the meaning of the Agreement.

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[1] On July 19, 1948, the Governments of the United States of America and Yugoslavia concluded an Agreement for the " expeditious and equitable settlement " of claims of the United States of America and of its nationals against Yugoslavia on account of the nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1939, and the date of the Agreement.

Article 1 (c) of the Agreement provided for the adjudication by an agency established by the United States of claims submitted thereunder. The International Claims Commission of the United States was established by the International Claims Settlement Act, 1940 (Public Law 455, 81st Cong., 2nd session (64 Stat. 12)). On August 21, 1948, the Government of Yugoslavia paid into the United States Treasury the sum of $17,000,000 in full settlement and discharge of all claims against Yugoslavia under the Agreement. (On July 1, 1954, the International Claims Commission was superseded by the Foreign Claims Commission of the United States.)

[2] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

The Commission said: " We now turn to the question, did the Yugoslav law, whereby claimants' deposit was reduced 90 per cent., constitute a ' nationalization ' or ' other taking ' of property or of rights and interests in and with respect to property within the meaning of the agreement ? . . .

" Claimants' deposit was made in prewar dinars; the obligation of the bank was to pay, under its rules and the terms of the deposit agreement, upon the demand of the claimants, in whatever medium was legal tender. The dinar was the legal tender at the time the deposit was made. An ordinary bank deposit is a debt, *i.e.*, an obligation to be discharged in money, and at the same time a chose in action.

" If money depreciates (loses its purchasing power) or is devalued (a lower ratio between gold and the monetary unit), a creditor does not have a right to more of the money unit (dinar) than he was entitled to prior to the depreciation or devaluation. As Mr. Justice Holmes said, ' in effect a dollar or a mark may have different values at different times. But to the law that establishes it, it is always the same.' (*Die Deutsche Bank, Filiale Nürnberg* v. *Humphrey*, 272 U.S. 517 at 519 (1926).) . . .

" During the occupation of Yugoslavia the deposit of the claimants remained an obligation of the Bank. Residents of Yugoslavia during the occupation could have received payment of their prewar bank deposits in occupation currency, which payment . . . would have discharged the debt. But claimants did not receive payment. Then the Yugoslav Government, in creating its monetary system following the occupation, told the debtors of Yugoslavia how much of the new money had to be paid in discharge of ' old ' debts ([Nussbaum, *Money in the Law, National and International*], p. 144). This has been termed ' revaluation ', which is defined as being ' the recasting of debts incurred in the former unit . . . . designed to restore, in part or in entirety, the original financial value of the debt, impaired or destroyed by inflation.' (Id. at p. 204.)

" Yugoslav currency was not ' ruined ' and inflation thereof was not ' catastrophic '. An increase in the note circulation from 7·3 billion dinars (1939) to 14·6 billion at the beginning of the German invasion, and then to the equivalent of some 292 billion old dinars in 1945 does not evidence a ' ruined ' currency or ' catastrophic ' inflation.

" Our own country abrogated contracts providing for payment in gold coin (the typical clause), or in the more elaborate clause ' to pay . . . dollars in gold coin of the United States of (or frequently " or equal to ") the standard of weight and fineness existing in . . . '.

" By the joint resolution of June 5, 1933, Congress declared contracts (private) permitting the obligees of bonds to demand payment in gold or in United States money measured in gold against public policy, in order to restore a uniform currency and to nullify so-called gold clauses which would have dislocated the domestic economy by requiring debtors under these clauses to pay $1·69 in currency while receiving taxes, rates, charges, and prices on the basis of $1 of currency. A new currency basis for the dollar was established by the President on January 31, 1934, whereby the weight of the gold dollar was fixed at 155/31 grains as against former standards of 258/10 grains. In *Norman* v. *B. & O. Railroad*, 294 U.S. 240, 1935, the Supreme Court of the United States decided that payment in gold coin as required by a bond issued by the railroad interfered with the monetary powers of Congress and could not be permitted. The contention of Norman was that the resolution interfered with contract and property rights of the fifth amendment. The court held that contracts dealing with subject matter (money) within the power of Congress were made with the full knowledge of Congress's power and had a 'congenital infirmity' which the parties could not remove from the reach of the power of Congress by making contracts about them.

" From what has been said it is evident that Yugoslavia violated no principle of international law in providing, as part of the re-establishment of its monetary system, for the payment of obligations incurred prior to military occupation at a rate of ten old dinars to one new dinar, and that the operations of the Yugoslav Law on the Settlement of Pre-War Obligations did not constitute a 'nationalization' or 'taking' of property within the meaning of the Yugoslav Claims Agreement of 1948."

[Report: *Settlement of Claims*, 1949-1955, p. 22.]

State Responsibility—For Debts—Bonds—Default on—Whether a Breach of Contract Involving State Responsibility.

NASH CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant was the holder of dollar bonds to the value of $6,200 issued by the Yugoslav Government, which were in default. Article 4 (c) of the Agreement between the Governments of the United States of America and Yugoslavia regarding " pecuniary claims of the United States and its Nationals " provided:

> " (c) The Government of Yugoslavia recognizes the obligation of the successor enterprises created by it with respect to debts valid under Yugoslav law which were incurred prior to the nationalization or other taking, for the benefit of the enterprises nationalized or

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

> otherwise taken, provided, however, that there shall be deemed fully settled and discharged all debt obligations of enterprises, nationalized or otherwise taken, owing to nationals of the United States whose claims against the Government of Yugoslavia with respect to the nationalization or other taking of such enterprises are claims which are fully settled and discharged by this agreement; . . ."

Article 10 (a) provided:

> " (a) The Government of Yugoslavia shall authorize persons residing in Yugoslavia who are legally indebted to any individual, firm, or governmental agency in the United States, to meet such indebtedness on maturity."

By Notes exchanged between the Governments of Yugoslavia and the United States on the conclusion of the Agreement, it was confirmed that " the Government of the Federal People's Republic of Yugoslavia recognizes among its other international obligations the dollar bonds issued or guaranteed by predecessor Yugoslav Governments."

Held: that no claim could be based on the holding of dollar bonds issued by the Yugoslav Government. Dollar bondholders were among the categories of American creditors excluded from participation in the fund created by the Agreement of 1948.

The Commission said: " The applicable principles of international law do not give this claimant any . . . standing. The view consistently followed by the United States is that a loan contract between a state and a foreign bondholder is not an international contract nor controlled by international law. Bondholders who purchase such obligations do so upon their own responsibility and at their own risk. An intervention will not be made by the United States Government unless there has been a denial of justice, or unless the breach of contract is considered confiscatory. At the time the present Government of Yugoslavia assumed power these dollar bonds had been in default for many years, but no laws or decrees have been enacted by that Government affecting dollar bonds but, on the contrary, the Yugoslav Government has recognized as among its international obligations the dollar bonds issued or guaranteed by predecessor Yugoslav Governments. This claimant, therefore, has no standing before this Commission under the principles of international law, as such claim properly was not espoused by the Government of the United States and, therefore, was not settled or discharged by the Yugoslav Claims Agreement of 1948. The claim is denied in whole."

[Report: *Settlement of Claims*, 1949-1955, p. 36.]

NOTE.—See, to the same effect, the *Petcovich* and *Baran Claims* (*ibid.*, p. 39), and (as to bonds issued in French francs and in Swiss francs) the *Wolf Claim* (*ibid.*).

See also the *Miljus Claim* (*infra*, p. 434).

VI.—For Wrongs Unconnected with Contractual Obligations

i.—Acts and Omissions of State Organs and Officials

(c) CONNECTED WITH LEGISLATION

State Responsibility—Connected with Legislation—Nationalization of Banks—Whether Constituting Nationalization of Property Rights of Debtors.

TABAR CLAIM (NO. 2).

United States, International Claims Commission.[1]

THE FACTS.—The claimants had deposited a sum of money in a Yugoslav private bank. By a Decree dated June 17, 1946, such banks were liquidated and nationalized. The Decree provided, *inter alia*, as follows:

> " In taking over all the assets, the State assumes the payment of all the obligations of the private credit enterprise in liquidation, within the limits of the transferred assets.
>
> " From the cash of the private credit enterprises in liquidation the obligations taken over will be paid according to the priority under article 5 of the decree.
>
> " The obligations taken over which originate from savings accounts are wholly transferred to the National Bank of [Yugoslavia] *under the same conditions under which they were held with the liquidating credit enterprise, within the limits of the effective provisions.* For these obligations there will be issued to the depositors savings books of the National Bank of [Yugoslavia]. (Emphasis added.)
>
> " All the other obligations taken over but not paid in the above described manner, will be paid in Government bonds payable to the bearer.
>
> " The due date and payment plan of these obligations, as well as the interest rate, will be determined later."

Article 22 of the Regulations Regarding the Procedure of Liquidating Private Credit Enterprises (Official Gazette No. 3 of January 10, 1948) provided for the payment in cash of the obligations assumed by the Government of Yugoslavia under Article 11 of the Decree of June 17, 1946.

The claimants contended that the loss of their bank account as a result of the nationalization of the Bank entitled them to compensation under the Yugoslav Claims Agreement of 1948.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

Held: that this contention must fail. The action of the Yugoslav Government in nationalizing the Bank had not resulted in any loss to the claimants.

The Commission said: "Summarizing the foregoing discussion, we can conclude that the Yugoslav Government did not nationalize or take the bank deposits of private solvent banks but, instead, provided for their transfer to the National Bank to the credit of the depositors, which bank issued a bank book for the full amount due as determined by the liquidation proceedings. No loss has been suffered by such depositors, nor have they been damaged as a result of the action of Yugoslavia. No property, or right or interest with respect thereto, has been taken by Yugoslavia within the meaning of the agreement. The private banks have been nationalized but, as has been noted, the deposits of solvent private banks will be, or have been, transferred to the National Bank. If a depositor in an insolvent bank receives the credit he is entitled to, depending upon the financial condition of the bank, he has suffered no loss.

"What loss has the depositor of a private bank suffered by the fact that his deposit has been transferred to a National Bank? Such a deposit represents an obligation due, not by a private enterprise, but by the Government itself, which owns the National Bank of Yugoslavia. By article 22 (2) of the Regulations, effective January 10, 1948 (*supra*), deposits in the National Bank are held by it under the same terms as the original deposits were held (i.e., provisions with original bank regarding payment, interest, etc.), within the limits of the effective provisions of law (i.e., to the extent of bank's solvency). The deposits transferred to the National Bank are, in every respect, equalized with the other deposits with the National Bank (i.e., no discrimination against new accounts).

"So, whatever right the depositor had under the original deposit he has under the new deposit with the National Bank. In this connection, article 22 of the National Bank Act of June 17, 1931 (Official Gazette No. 137 of June 30, 1931), which provided that the National Bank is subject to the jurisdiction of the regular courts, has been upheld as valid by the decree of January 15, 1946 (Official Gazette No. 6 of January 18, 1946). The basic Law of State Economic Enterprises of July 24, 1946 (Official Gazette No. 62 of August 2, 1946) provides that such enterprises are responsible for their obligations to the extent of the property they have received to administer.

"The foregoing clearly shows that Yugoslavia did not 'nationalize' or 'take' the reduced (so-called 10 per cent.) deposit. To conclude otherwise would be to distort the meaning of article 11 of the agreement. This article refers to 'deposits *in* banks and other similar forms of capital . . .' It does not refer to deposits *to be* placed in banks at some time subsequent to the nationalization or liquidating decree or to the execution of the agreement.

"The Commission has carefully reviewed the negotiations leading up to the agreement of 1948, and it is satisfied with its conclusion that claims based upon a reduced bank account were not among those espoused by the United States nor included in the claims settled and discharged by the agreement."

[Report: *Settlement of Claims*, 1949–1955, p. 29.]

ii.—Acts of Insurgents, Rioters, and Private Individuals in General

State Responsibility—For Acts of Rioters—Dependent Territory—Protectorate—Whether Protecting or Protected State Responsible—Status of Tunisia while Protectorate of France.

See p. 47 (*Trochel* v. *State of Tunisia*).

VII.—For Acts and Omissions of Revolutionary or *de facto* Governments

State Responsibility—Responsibility for Acts of Local Revolutionary Government—Responsibility for Acts of Officials Committed by Mistake and in Excess of Competence—Concurrent Rights of Compensation in the International and Municipal Spheres—Responsibility of Italy for Acts of Revolutionary Italian Social Republic after the Second World War.

MOSSÉ CLAIM.

Franco-Italian Conciliation Commission. February 23, 1953.
(Bolla, Perier de Feral, Sorrentino.)

THE FACTS.—In 1936 Madame Mossé, a French Jewess, who had been divorced from her husband, Goldschmied, an Austrian Jew, took up her residence in Milan, Italy. In 1938, fearing the approach of a war in which Italy would be involved, Mme Mossé put her household furniture and effects in store and went to live in a hotel. Early in 1940, she left Italy and went to Egypt. In 1943, bombs having fallen near the place where Mme Mossé's furniture was stored, Goldschmied (who lived in Milan and had remained on good terms with his former wife) had the furniture moved for safety into the crypt of the Church of the Minor Brothers. He represented himself to the latter as a victim of racial persecution and asked their assistance in protecting his wife's property from measures taken by the Government of the Italian Social Republic against Jews. At the same time, he deposited in a room belonging to one Rossi, certain valuables of his own, to avoid their being confiscated as the property of a Jew. On May 20, 1944, Albertini and other police officers sequestrated what were described as " sundry household goods, the property of the Jew Goldschmied ", and took away part of the goods to a nearby warehouse. After that, they sealed the door of the room where they had left the remainder of the property. A report on all this, specifying the articles removed, was drawn up and signed by Albertini. At the same time, " Nazi-fascist forces " presented themselves at the Church of the Minor Brothers and, claiming that they held a confiscation order of the Prefecture of Varese, by force of arms removed everything that had been deposited by Goldschmied, including the inventory thereof.

On June 21, 1941, an inventory of goods belonging to Goldschmied was drawn up at the Questura (police headquarters) of Varese. On September 11, 1944, the Chief of the Province of Varese decreed the confiscation to the State of the moveable property of the Jew Goldschmied mentioned in the inventory, and ordered their transfer to an official administrator. On May 3, 1945, the Prefect of Varese annulled the confiscation, and some time later Goldschmied re-took possession of certain of the goods, which did not, however, include any of the belongings of Mme Mossé. These had apparently been in part sold by auction by the Prefecture and in part pawned and then taken away by Fascists under a written order (which had not since been traced).

In 1945, Goldschmied sued Albertini, without success.

In 1947, Mme Mossé returned to Europe and lodged a claim against the Italian Government for the return of her property or compensation therefor. In 1949, the Italian Treasury rejected the claim on the grounds (a) that the facts alleged had not been sufficiently proved and (b) that the claimant's property had not been made the object of measures taken under war legislation, so that Article 78 of the Treaty of Peace with Italy was not applicable. Mme Mossé was left to the rights given by Italian law, in particular the Decree-Law of May 5, 1946, to Jews who had been the victim of racial legislation. In 1951, however, the French Government claimed on her behalf before the Commission :—

> (1) that by virtue of Article 78 (4) of the Treaty, the Italian Government was responsible for the spoliation of which Madame Mossé had been the victim in 1944;
>
> (2) that Madame Mossé was entitled to compensation equal to two-thirds of the sum required, at the date of the payment thereof, to buy goods equivalent to those of which she had been deprived as the result of such spoliation.

On her behalf, it was contended that the fact that she could claim under Italian Laws relating to Jews who had been the victims of racial legislation did not deprive Mme Mossé of the rights conferred by Article 78 of the Treaty, provided that she came within its terms. It was conceded that the removal by the police of property, unconnected with any military operation or the conduct of the war, could not constitute war damage under Article 78 (4) (*a*)[1] of the Treaty, but it was urged that such removal did come within Article 78 (4) (*d*)[2].

In reply, it was contended by the Italian Government that the facts had not been proved; that Mme Mossé was the victim not of an act authorized by the Italian Government but of an act of pillage committed by Albertini; and, as a subsidiary argument, that, even assuming the act to have been authorized, Article 78 (4) (*a*) of the Treaty of Peace was not applicable because there was no question of war damage, nor was Article 78 (4) (*d*) seeing that the damage resulted from measures which were applicable to the property of Italian Jews.

Held: that the claims must succeed.

I. *Concurrent Rights of Compensation in the International and Municipal Spheres.*—The Commission considered that there was no need to enquire whether Mme Mossé had a claim against the Italian Government for the loss of her effects, under Italian laws which granted compensation to Jews for losses caused by racial legislation against them and, in particular, Decree-Law No. 393 of May 5, 1946. The Commission continued: " The right given by Article 78 of the Treaty of Peace to the United Nations and their nationals is not subsidiary to any right which may be granted to them by municipal legislation. A United Nations national in whose favour a right of restitution or of compensation against the Italian Government has been created by the Treaty of Peace may enforce that right before the international tribunal set up under Article 83 of the Treaty, even if by chance he might arrive at the same result by an action based on some other right accorded by Italian municipal law and brought before the competent municipal court.

" It is not exceptional for one and the same material fact to be taken into consideration on both the international and the national plane. In such a case, indeed, the juridical nature of a fact being always regarded relative to a given legal system, the material fact constitutes not one juridical fact but two distinct juridical facts:

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[1] Article 78 (4) (*a*) provides :
The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals.

[2] Article 78 (4) (*d*) provides:
The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit.

one international juridical fact, with the juridical consequences which are attached to it by the international juridical system; and a municipal juridical fact, with the juridical consequences which are attached to it by the municipal juridical system (Morelli, *Rules of International Law*, pp. 75 and 76). Apart from the repercussions of one juridical system upon the other, each of them—in this instance, the international juridical system—appears to be autonomous (Morelli, *op cit.*, p. 77).

" In Article 78, para. 4 (*d*), of the Treaty of Peace, there is no reference to the Italian municipal system; it would be difficult moreover, to imagine such a thing in a treaty which was not negotiated but was imposed on a defeated Power.

II. *Responsibility for Acts of Local Revolutionary Government.*— " The Commission found from the evidence before it that Mme Mossé had been deprived of her effects in circumstances which involved the responsibility of the Italian Government.

" The removal of the effects from the house and the church was one of the acts of racial persecution of which Northern Italy was the theatre in 1944, on the part of certain organs of the Republic. These organs must be regarded, in view of the position accorded to them in fact and in law by the said Republic, as connected with the armed forces of the reconstituted Fascist Party, and with the armed forces of the Axis, whether the German forces or those which were employed by Mussolini's reconstituted Government.

" Article 78 (4) (*d*) of the Treaty of Peace does not specify from whom the measures taken against the property of United Nations nationals should emanate in order to give rise to the juridical consequences there mentioned. In the present instance, it is sufficient, and within the spirit and the letter of those provisions, that the measures should have been taken by him who in fact exercised political power in the territory where the property was situated. The operation carried out in the church in Milan appears as a measure attributable to those who at that time exercised, from the point of view of international law, political authority in Milan, that is to say, the organs of the Republic. It is irrelevant that the latter, formerly allied to Nazi Germany, must have been subject to pressure on the part of its Ally and must have been largely influenced in its decisions by the will of that Ally. Such an interpretation of the Treaty of Peace, moreover, is in accordance with international law . . .

" The interpretation here given to para. 4 (*d*) is opposed neither in the letter nor in the spirit to paras. 2 and 3 of Article 78 of the Treaty of Peace. Paragraph 2, in effect, provides that the Italian Government shall nullify certain measures taken by it against United Nations property, and, therefore, measures taken by whoever exercised political authority on that part of Italian territory where that property was situated at the moment when those measures were taken. Paragraph 3, so far as concerns the invalidation of transfers, goes even further, assimilating measures of force or coercion taken by the Government of one of the Axis Powers (or by one of its agencies) to those taken by the Government of the Allied Power (or by one of its agencies), without discriminating by whom political authority was exercised at the place where and at the time when the measure of force or coercion took effect. But the present case is not one of transfer of property within the meaning of para. 3.

III. *Responsibility for Acts of Officials Committed by Mistake and in Excess of Competence.*—" In carrying out the confiscation of the property of Goldschmied by public officials acting in the exercise of their functions and in the interest of the political authority for whom they were operating, an error was committed in that they took as belonging to Goldschmied certain articles which were the property of his wife. Such an error does not have the effect of transforming the removal of the property of Mme Mossé into a personal act on the part of the officials who carried out that removal; mistakes of this kind are clearly conceivable and inevitable in the ordinary conduct of administration. The fact that, in the result, the property of Mme Mossé was taken away either by Albertini and his followers or by others (circumstances over which the greatest obscurity rests) does not exonerate the Italian Government from its responsibility for the removal effected in the church [at Milan]. A personal claim would indeed lie against the officials in question, but it would be postponed to the act, that is, the spoliation, which caused the loss complained of and which was committed within the prescribed limits of their duty.

IV. " Even if it has to be admitted that Albertini and the officials who accompanied him were, at the time of the removal of the effects of Mme Mossé, acting outside the prescribed limits of their duty, it ought not to be deduced from that, without more, that the present claim is not well founded . . . ."

V. With regard to the application of Article 78 (4) (*d*) of the Peace Treaty with Italy, the Commission said: " [In the provision that] ' The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) . . . to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property ', the expression ' measures ' is deliberately given a fairly broad meaning.

" In regard to a given property, the measure will necessarily always be individual, but it may or may not be the application of a provision of the general law. If it is, it should, in order to give rise to an indemnity, have been discriminatory and, in consequence, not applicable to Italian property. In the present case, no measure was ordered against Mme Mossé, either in application of anti-racial laws or in application of war legislation. It is not possible to examine the discriminatory character of a non-existent measure.

" In the course of the execution of anti-racial measures against the property of Goldschmied, some articles of furniture belonging to Mme Mossé were taken in error by organizations for the acts of which the Italian Government is responsible. The Italian Government is in neither a state nor a position to restore them under Article 78, paras. 1 and 2, of the Treaty of Peace. It must compensate Mme Mossé in the proportion fixed by para. 4 (*d*) of that Article.

" Seeing that the police officials did not intend to take the property of Mme Mossé (they were acting on an order of the Prefecture of Varese and that order applied only to the property of Goldschmied), the removal of the property of Mme Mossé was an act without juridical basis, and, for that reason only, it brought into effect the consequences of para. 4 (*d*) of Article 78 of the Treaty of Peace. As regards an individual act of that kind, it is not even possible to enquire whether it fulfils the conditions mentioned in the clause ' and which were not applicable to Italian property '. That condition has, and can have, one meaning only for the measures which form the application of a general rule (which rule, from another point of view, will appear special if it is not applicable to Italian property), unless it is better to say that a measure without a juridical basis is for that reason only discriminatory, since the law does not provide for its application to Italian property.

" The interpretation of paras. 2 to 9 of Article 78 of the Treaty of Peace should have constantly in mind the general rule of para. 1 of that Article. An interpreter who pays heed to that warning cannot absolve the Italian Government from responsibility, within the meaning of Article 78, para. 4 (*d*), for property taken by force as the result of an individual measure taken by the actual Italian political authority without any juridical basis."

[Report: *Recueil des Décisions*, Part 4, p. 117.]

NOTE.—The Italian member of the Commission appended a dissenting opinion.

B.—CLAIMS

I.—In General

Claims—In General—Waiver of Claims—By Treaty—Effect of " Save Harmless " Provision—Construction of Peace Treaty.

NERI *v.* UNITED STATES.

United States, District Court, Southern District, New York. November 2, 1951.

Court of Appeals, Second Circuit. June 3, 1953.

THE FACTS.—In 1946, a tanker owned by the United States and allocated to the United States Navy struck a mine off Livorno, Italy, and was badly damaged in the resulting explosion. In response to a call for help, tugs of the libellant in this action, the operator of a salvaging concern, assisted the damaged tanker into port. The libellant, a national and resident of Italy, brought this action for salvage services allegedly rendered to the respondent. The United States defended on the ground that the claim of the libellant had been waived by the Treaty of Peace with Italy of February 10, 1947, T.I.A.S. 1648, 61 Stat. 1245, and by a Memorandum of Understanding between the United States and Italy of August 14, 1947, T.I.A.S. 1757, 61 Stat. 3962 (the relevant portions of which are quoted in the opinion of the Court of Appeals).

Held (by the District Court): that the libel must be dismissed. The broad terms of the Treaty of Peace and of the Memorandum of Understanding waiving the claims of Italian nationals against the United States embrace the libellant's claim. The provision whereby Italy had agreed to save the United States harmless from " any responsibility and liability for the processing, settlement and satisfaction of any claims " does not require the United States to settle the claim and then seek reimbursement from Italy. [Report: 102 F. Supp. 718.]

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be affirmed on the same grounds as adduced by that Court. In addition, there was no reason to construe the Peace Treaty and Memorandum of Understanding in favour of Italy, despite the circumstances in which that State withdrew from the War.

The Court said: " The state of war, between the United States and Italy, declared on December 11, 1941, 55 Stat. 797, 50 U.S.C. Appendix, p. 7, still continued at the time of the accident here. The Treaty of Peace between the nations was entered into on February 10, 1947, was ratified on June 14, 1947, and became effective September

15, 1947, 61 Stat. 1245, U.S.Code Cong.Serv.1947, p. 2321. Section III relates to the renunciation of claims by Italy and provides in Article 76, 61 Stat. 1245, at 1401:

> ' 1. Italy waives all claims of any description against the Allied and Associated Powers on behalf of the Italian Government of Italian nationals arising directly out of the war or out of actions taken because of the existence of a state of war in Europe after September 1, 1939, whether or not the Allied or Associated Power was at war with Italy at the time, including the following:
>
> ' (a) Claims for losses or damages sustained as a consequence of acts of forces or authorities of Allied or Associated Powers;
>
> ' (b) Claims arising from the presence, operations, or actions of forces or authorities of Allied or Associated Powers in Italian territory;
>
> . . . . .
>
> ' (d) Claims arising out of the exercise or purported exercise of belligerent rights.
>
> ' 2. The provisions of this Article shall bar, completely and finally, all claims of the nature referred to herein, which will be henceforward extinguished, whoever may be the parties in interest. The Italian Government agrees to make equitable compensation in lire to persons who furnished supplies or services on requisition to the forces of Allied or Associated Powers in Italian territory and in satisfaction of non-combat damage claims against the forces of Allied or Associated Powers arising in Italian territory.'

" Thereafter on August 14, 1947, the United States and Italy entered into a Memorandum of Understanding ' regarding settlement of certain wartime claims and related matters.' Therein, in reaffirmation of Article 76 of the Treaty of Peace, the Government of Italy ' waives ' all claims of any description arising out of the war, Art. I subd. 1 (a), and ' further discharges and agrees to save harmless the Government of the United States of America from any responsibility and liability for the processing, settlement and satisfaction of any such claims of Italian nationals.' Id. subd. 1 (b). The Memorandum continues in id. subd. 4 (a):

> ' 4. (a) The Government of Italy discharges and agrees to save harmless the Government of the United States of America from any responsibility and liability for the processing, settlement and satisfaction of any claims:
>
> ' (i) of Italian nationals, whether or not asserted in the courts of any country, respecting which the ultimate liability is that of the Government of the United States of America, and arising out of maritime incidents, occurring between September 1, 1939 and the coming into force of the present Memorandum of Understanding, excluding incidents involving ships engaged in purely commercial activities; . . . .'

" These provisions seem clearly broad enough to bar the present claim. Conceivably it might be possible to read the Treaty provisions as referring only to claims for damage done to Italians, not by the Italian Government to property of our Government. But this seems a more narrow reading than the language employed will justify. Thus in subd. 2 of Article 76 of the Treaty the Italian Government agrees to compensate ' persons who furnished supplies or services on requisition ' to the Allied forces and ' in satisfaction of non-combat damage claims ' against Allied forces in Italian territory. These claims seem obviously those of Italian nationals; just as obviously they avoid duplicating the claims covered in subd. 1, thus suggesting as wide a coverage, so far as concerns the nature of the claimants, in subd. 1 as in subd. 2. But the broad terms of the Memorandum of Understanding remove all doubt. This contains a specific discharge of claims of Italian nationals. The court has properly found that the damaged tanker was not engaged in purely commercial activities; and this conclusion is controlling, whether the tugs be considered commercially dedicated or not.

" Libellant stresses two further contentions. The first is his argument that the tanker's injury, and hence the necessary salvage, was caused proximately by her master's negligence in going into the chartered danger zone; on this basis, therefore, the claim sued upon could not be considered one arising out of war actions. This would seem contrary to the Court's findings. In any event it is of no moment, for claims based on negligence are within the all-inclusive language of bar. The second is that, since Italy's obligation is to save the United States harmless from claims of Italian nationals, the case must go forward to a conclusion, with respondent collecting over in the event of a judgment against it. Here, also, the language is too precise to justify such a conclusion. The claims are barred ' completely and finally '; and this goes so far as their ' processing ', ' whether or not asserted in the courts of any country.'

" Libellant asserts that the Treaty was intended to and should be construed generously in Italy's favor, since that country withdrew from the war at a comparatively early date and itself declared war on Germany. But this is particularly noted as a ground of leniency and as a reason for renunciation of various claims by the United States, in Article II of the Memorandum of Understanding itself. The extent of consideration to be granted was surely for the United States to decide in the Treaty and the agreement depending on the Treaty; it was the winner in the war and, as Judge Goddard says, ' it seems highly unlikely that any victorious nation would allow the nationals of the defeated nation to sue the victor on claims arising from the war or occupation. ' 102 F.Supp. at page 720. And the intended bar is of course quite legal and effective. *United States* v. *Chemical Foundation, Inc.*, 272 U.S. 1, 11, 47 S.Ct. 1, 71 L.Ed. 131; *Santovincenzo* v. *Egan*, 284 U.S. 30, 40, 52 S.Ct. 81, 76 L.Ed. 151;[1] *Ozanic* v. *United States*, 2 Cir., 188 F.2d 228.[2] "

[[1] See *Annual Digest*, 1931–1932, Case No. 114.]
[[2] *Ibid.*, 1949, Case No. 50.]

[Reports: 204 F.2d 867; *certiorari* denied, 348 U.S. 820, 99 L.Ed. 646, 75 Sup. Ct. 31 (1954).]

II.—Nationality of Claims

State Responsibility—Claims—Nationality of—Corporations—Relevance of Nationality of Beneficial Owners of Stock.

WESTHOLD CORPORATION CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimants were a corporation established in accordance with the laws of the State of Delaware. Although more than 80 per cent. of the registered shareholders were United States nationals, the corporation stock was beneficially owned by aliens. The corporation filed a claim for compensation for its property in Yugoslavia which it was alleged had been nationalized or taken by the Yugoslav Government.

Under Article 2 of the Claims Agreement of 1948 between the Governments of the United States and Yugoslavia,

> " The claims of nationals of the United States to which reference is made in Article 1 of this Agreement include those respecting property, and rights and interests in and with respect to property, which at the time of nationalization or other taking were:
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> . . . .
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> " (B) Directly owned by a juridical person organized under the laws of the United States, or a constituent state or other political entity thereof, 20 percent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States, directly or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise; or
>
> " (C) Indirectly owned by . . . a juridical person within category (B) above, through interests, direct, or indirect in one or more juridical persons not within category (B) above, or otherwise."

Held: that the claim must fail. It was not sufficient that 20 per cent. or more of the registered shareholders were United States nationals; for a corporation to be entitled to compensation, at least 20 per cent. of the stock must be beneficially owned by individual nationals of the United States.

The Commission said: " The Agreement of 1948 provides, so far as juridical persons are concerned, that the only corporate claims settled in Article 1 are those of the category of juridical persons defined in Article 2 (B) of the Agreement . . . It is apparent that a corporation is an eligible claimant only if: (1) the corporation was organized under the laws of the United States, or state or other political entity thereof, and (2) 20 percent of the 'outstanding securities' of the corporation was 'owned' by individual nationals of the United States, directly or indirectly. As the claimant is a Delaware corporation, it satisfies the first condition above mentioned.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

"Further, if by the word 'owned' is meant record or legal ownership, the claimant would satisfy the second condition, for well over 20 percent of the corporate stock—a class of outstanding securities—was registered in American citizens or legal title was in American citizens or corporations at all pertinent times. If, however, the word 'owned' means beneficial ownership, the corporation does not satisfy the second condition, for the entire beneficial ownership of its stock was in aliens at the time of the alleged nationalization or taking and at all times subsequent to December 1940.

"The Agreement has, of course, pierced the corporate veil to expose ownership of the stock. Has it taken the additional step and pierced the veil of record ownership to expose the beneficial owner of the stock?

"The criteria adopted by nations in determining what claims they will espouse against other nations are often not susceptible of being elucidated into a well-defined international law. This is particularly the case in the espousal of corporate claims. Nations have variously used the *siège social* (principal place of business), the test of 'control', and finally the place of incorporation as criteria in determining whether to espouse a corporate claim. See Feller, *The Mexican Claims Commission*, page 115. (It is observed that under the British-Yugoslav Agreement all companies, firms or associations incorporated under the laws of the United Kingdom or its territories are British nationals.)

"The Yugoslav Claims Agreement, however, as has been noted, imposes the additional requirement that 20 percent of the outstanding securities be 'owned' by American individuals.

"The criteria which the Department of State utilized in determining whether to espouse corporate claims consist of two elements.

"First, it has required that the corporation be incorporated under laws of the United States or a constituent state. See Borchard, *Diplomatic Protection of Citizens Abroad*, pages 620–1; Hackworth, *Digest of International Law*, Vol. V., pages 831 *et seq*. This requirement has, of course, been explicitly incorporated in Article 2 of the Yugoslav Claims Agreement of 1948.

"Secondly, the Department has required that there be a beneficial American interest in such corporation to authorize diplomatic espousal of a claim. See Borchard, *supra*, pages 621–2.

"In the Report of the Senate Committee on Foreign Relations reporting out H.R. 4406 (Public Law 455), it is stated:

" ' Under international law, governments have been known to espouse claims of their corporations, although all of the corporate stock be foreign held. This Government, in its negotiations with the Yugoslav Government, did not take this extreme position, being of the view that a substantial American beneficial interest should exist in an American juridical entity prior to espousal of the entity's claim. It was agreed that this substantial interest would be " 20 percent or more of any class of outstanding securities which were at such time (the time of the nationalization or other taking of the property) owned by individual nationals of the United States." It is conceivable that the remaining 80 percent might be held by foreign nationals, resident or nonresident in the United States . . . *Calendar No. 810, Report No. 800, 81st Session*, pages 10 and 11.'

" The conclusion therefore must be that the requirement as to 20 percent of the stock ownership in American nationals was to assure a substantial American beneficial interest.

" From the above we can only conclude that the words of the Agreement of 1948 in Article 2 (B), ' 20 percent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States . . . ' mean beneficially owned by individual nationals of the United States.

" As it has not been shown that 20 percent of any class of the outstanding securities of the claimant corporation were beneficially owned by individual nationals of the United States at the time of nationalization or other taking of its property by the Government of Yugoslavia, this claim must be denied in whole."

[Report: *Settlement of Claims*, 1949–1955, p. 40.]

See also the *Binder-Haas Claim* (*infra*, p. 236).

State Responsibility—Nationality of Claims—Nationality of Heirs of Deceased Creditor.

STRAUB CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant was the administrator of the estate of George and Katherina Straub, deceased, who were nationals of the United States and who died subsequent to the taking of their property by the Yugoslav Government. On the question whether the Commssion should enquire into the nationality of the heirs,

Held: that the claim should be allowed without enquiry into the nationality of the heirs.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

The Commission said: "We are of the view that since the decedents were citizens of the United States at the time their property was taken (February 6, 1945), and citizens and residents of the United States at the time the agreement between the United States and Yugoslavia was signed (July 19, 1948), that their claim has met the nationality requirements of the agreement. We are aware that there is international legal precedent to the effect that a claim must be national from the date of origin to the date of settlement. The agreement with Yugoslavia provided for the settlement of claims involving many thousands of persons. More than 6 years have already elapsed since the agreement was signed. In the interim several hundreds of claimants (including original claimants and their successors) have died. If a claim has once been completely documented, the Commission would not, in most instances, have knowledge of the deaths of persons who had an interest in the claim. If it had to reinvestigate this aspect of each claim and require proof of death, succession, and nationality, it would be faced with a continuing and ever increasing burden which would tend to defeat the primary purpose of the agreement, i.e., the prompt payment of effective compensation for the taking of property. This added burden upon the Commission would increase the cost of determining claims and, since the expenses of the Commission are deducted from awards, the end result would be a diminution of all awards. As the Commission is not in a position to undertake this additional burden with respect to all claims, it would be inequitable to deny this claim, and one or two like it, because it happens to have knowledge that some of the persons who share in the award are not citizens of the United States.[1] This claim will, therefore, be allowed."

[Report: *Settlement of Claims*, 1949–1955, p. 21.]

State Responsibility—Claims—Nationality of—Necessity for Claimants to Have Had Nationality of State Preferring Claim at Date of Claims Agreement.

MOORE CLAIM.

United States, International Claims Commission.[2]

THE FACTS.—The claimant, who became a national of the United States on August 3, 1948, filed a claim for compensation for property worth some $4,000,000 which, it was alleged, had been nationalized or otherwise taken by the Government of Yugoslavia. The claim was brought under the Agreement of July 19, 1948, between the Governments of the United States of America and the Federal People's Republic of Yugoslavia Regarding Pecuniary Claims of *the United States and its Nationals;* and the expression "nationals of the United States" recurs throughout the Agreement.

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[1] In a previous decision, the *Bogovich Claim*, the Commission had held that a claim must be "national" at least from the date of origin to the date of the Agreement with Yugoslavia. In that case, it was not necessary for the Commission to decide, and it did not decide, the question of nationality subsequent to the date of the Agreement.

[2] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

Held: that the claim must fail. Only those persons who were nationals of the United States of America before the date of the signature of the Agreement were entitled to be paid compensation thereunder.

The Commission said: "Claimants, nationals of the United States who can assert claims for property nationalized or otherwise taken by the Yugoslav Government, are strictly limited, by the Treaty of July 19, 1948, referred to above, to those who were nationals at the time of nationalization or other taking, occurring between September 1, 1939 and July 19, 1948. This claimant, not being a national of the United States during this specified period of time, cannot assert a claim against the fund created by the Yugoslav Claims Agreement of 1948. This limitation expressed in the Yugoslav Claims Agreement of 1948 conforms with international law and practice that an injury to an individual is an injury to the state of which he is a national. Thus, the nationalization or other taking of the property of a person who is not a citizen of the United States at the time of such taking could not constitute an injury to the United States warranting it to intervene on his behalf. This claimant, not being a national of the United States during this specified period of time, cannot assert a claim against the fund created by the Yugoslav Claims Agreement of 1948."

[Report: *Settlement of Claims*, 1949–1955, p. 40.]

State Responsibility—Claims—Nationality of—Dual Nationality of Claimant.

Martincic Claim.

United States, International Claims Commission.[1]

The Facts.—This was a claim by a naturalized United States national for compensation for certain agricultural land in Yugoslavia belonging to her which was alleged to have been nationalized or taken by the Government of Yugoslavia. That Government reported that the property was under the management of a relative of the claimant, by virtue of a power of attorney issued by the claimant, in whose name the property was still entered in the Yugoslav Land Registry.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

The Nationalization Law of April 28, 1948 (Official Gazette No. 36, April 29, 1948), nationalized, *inter alia*, certain real property, including " all real property owned by foreign citizens," with certain stated exceptions not here applicable, and authorized the Ministry of Justice to " issue the necessary instructions for the transfer to the State of nationalized real property." Instructions issued on June 23, 1948, pursuant to such authority, contained the following definition of " foreign citizen " (Official Gazette No. 53, June 23, 1948):

> " IX. Our emigrants who have acquired foreign citizenship but who have not obtained a release from our citizenship, and who neither have a decree from the Ministry of the Interior stating that they have lost their citizenship nor that their citizenship was revoked, are not considered foreign citizens. Therefore, the real property of such persons is not nationalized, regardless of the class of property and regardless of whether they are farmers or not."

The Government of Yugoslavia contended that although the claimant had acquired United States citizenship she had not lost Yugoslav citizenship; that her real property was, therefore, exempt from nationalization; that no restrictive measures had been applied to it; and that she was at liberty to sell or otherwise dispose of it in the same way as any other citizen of Yugoslavia.

Held: that the claim must fail. The claimant having retained her Yugoslav nationality, her property had not in fact been subjected to nationalization or other taking by the Yugoslav Government.

The Commission said: " Thus, it appears that the Nationalization Law of April 28, 1948, as construed by the Minstry of Justice of Yugoslavia under authority conferred in the Act itself, is not applied by the Government of Yugoslavia as a taking of property of ' foreign citizens ' if such citizens have not lost Yugoslav citizenship. Apparently, the claimant has been held to be within that category, and in the absence of actual interference with her ownership or possession, of which there is no evidence, she is not eligible to receive an award under the Yugoslav Claims Agreement of 1948."

[Report: *Settlement of Claims*, 1949–1955, p. 42.]

NOTE.—See also the *Raseta Claim* (*ibid.*, p. 43), in which the claimant, although a United States citizen by naturalization, was still considered by the Yugoslav Government to be a national of Yugoslavia. Rejecting his claim, the Commission said: " . . . we are not in a position to refute the determination of the Yugoslav Government, that under its laws claimant is a citizen of Yugoslavia. Even if we did and proved to our satisfaction that claimant should not be considered to be a Yugoslav citizen, we could not compel Yugoslavia to change its position and take possession of claimant's property. We wish to emphasize, however, that we did not deny this claim on the ground that claimant is a citizen of Yugoslavia. We denied the claim on the grounds that the property involved had not been interfered with by Yugoslav authorities up to December 1953, the date of our investigation, or almost 6 years after the Nationalization Law of April 28, 1948 became effective, and the advice of the Yugoslav Government that claimant's property had not been taken because he was considered to be a Yugoslav citizen and concluded therefrom that it would be unjust to other claimants to make an award for it. In reaching this conclusion, we were mindful that the Government of Yugoslavia has paid a lump sum of $17 million in settlement of claims for the nationalization or other taking of property of American nationals between September 1, 1939 and July 19, 1948 and that that sum may not be sufficient to pay claims in full; and that the Government of Yugoslavia will be obligated tó pay additional compensation if it changes its position with respect to claimant's citizenship status and takes his property at a later date or treats it as having been taken by operation of law on April 28, 1948. Because of these circumstances it would, indeed, be anomalous for this Commission to hold over the objections of the Yugoslav Government, that its interpretation of its citizenship law is incorrect and that the property had been taken on April 28, 1948. Such a holding might be desired by some claimants because they preferred to share in the $17 million fund now than await future payment, but it would clearly prejudice other claimants whose awards might be reduced proportionately. It is our view that the Commission is obligated in determining awards which are to be paid out of a limited fund to consider the interests of claimants from an over-all standpoint. It has done so with respect to this claim and is satisfied that its decision on the matter is correct.

" As heretofore pointed out, we did not hold that claimant either lost or retained his Yugoslav citizenship. We merely referred in our decision to the position of the Yugoslav Government in the matter to explain why it did not consider the Nationalization Law of April 28, 1948 applicable to the claimant's property. That reference is not open to the construction and should not be construed as meaning that claimant or anyone else in a similar situation is not a citizen of the United States. For the purpose of emphasis, we add that even if we found affirmatively that a particular claimant had not lost Yugoslav citizenship under the laws of that country, such a finding would not impair or affect his United States citizenship and would not reflect upon his loyalty or attachment to the United States.

" For the foregoing reasons, the Commission affirms its proposed decision in this claim in its entirety."

State Responsibility—Claims—Nationality of—Rule of Continuity of Nationality—Claimant Succeeding to Claim Prior to Becoming National of State Preferring Claim.

KREN CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant, Magdalena Kren, was executrix of the will of Jospeh Kren, who became a naturalized citizen of the United States on March 11, 1940. On February 6, 1945, his property was taken by the Government of Yugoslavia. He died on April 21, 1948. On July 19, 1948, an Agreement regarding pecuniary claims of the United States and its nationals was concluded between the United States and the Federal People's Republic of Yugoslavia. Magdalena Kren did not become a national of the United States until December 13, 1948. She now claimed compensation as executrix of Joseph Kren.

Held: that the claim must fail. Its nationality ceased to be American upon the death of Joseph Kren, and as his personal representative was at that time not a United States citizen the claim did not have the continuous national character required to entitle it to be espoused by the United States.

The Commission said: " Since Magdalena Kren was not a citizen of the United States on April 21, 1948 (the date of her husband's death), the question presented is whether she is eligible to receive an award under the Yugoslav Claims Agreement of July 19, 1948 in view of the fact that the claim herein lacked continuity of American citizenship from the date of the taking of the property by the Government of Yugoslavia (February 6, 1945) to the date the Agreement was signed (July 19, 1948).

" The Agreement is not definite as to whether a nonnational of the United States who does not acquire United States nationality until subsequent to the signing of the Agreement on July 19, 1948, but who succeeds to a claim prior to that time which was owned by a national of the United States at the time of its origin, shall be eligible for compensation under the Agreement.

" In order to resolve this question it is, therefore, necessary to look to the negotiations leading up to the Agreement, the International Claims Settlement Act of 1949, and any other available data. The Commission obtains no assistance from the history of the negotiations. The International Claims Settlement Act of 1949 provides in section 4 (a) that in deciding claims, the Commission shall apply ' (1) the provisions of the applicable claims agreement as provided in this subsection; and (2) the applicable principles of international law, justice and equity '. Thus, the Commission feels impelled to follow ' the applicable principles of international law ' in deciding this question.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

" It is a well settled principle of international law that to justify diplomatic espousal, a claim must be national in origin; that it must, in its inception, belong to those to whom the state owes protection and from whom it is owed allegiance (Borchard, *The Diplomatic Protection of Citizens Abroad*, p. 666). Further, although the national character will attach to a claim belonging to a citizen of a state at its inception, the claim ordinarily must continue to be national at the time of its presentation, by the weight of authority (Borchard, *supra*, p. 666), and there is a general agreement that it have a continuity of nationality until it is filed (Feller, *The Mexican Claims Commission*, p. 96). That it must continue its national character until its settlement or decision will also be shown by cases cited subsequently.

" As a rule, the Government of the United States refuses to espouse claims which have not continued to be impressed with American nationality from the date the claim arose to the date of its settlement (Hackworth, *Digest of International Law*, vol. 5, p. 804). Thus, in its form, 'Application for the support of Claims against Foreign Governments', issued by the Department of State on May 19, 1919, and revised on October 1, 1924, the following language appears in paragraph 6:

> ' Moreover, the Government of the United States, as a rule, declines to support claims that have not belonged to claimants of one of these classes [those who have American nationality or who are otherwise entitled to American protection] from the date the claim arose to the date of its settlement.' Quoted in Eagleton, *The Responsibility of States in International Law*, p. 269.

" The practice of the State Department in conformity to this principle is illustrated in a letter of August 11, 1926, addressed to an attorney of a company in connection with a claim allegedly incurred by a requisition by Italian authorities. The letter stated:

> ' . . . it is assumed that this Insurance Company was a foreign corporation, in which case there would be a break in the continuity of American ownership of this claim . . . The Government of the United States, as a rule, declines to present claims through diplomatic channels that have not belonged to American claimants from the date the claim arose to the date of its settlement.' Quoted in Hackworth, *supra*, page 805.

Similarly, where an American claimant died subsequent to the submission of his claim to the Japanese Government, leaving his Japanese wife as his sole heir and as executrix under his will, the Department of State refused to espouse the claim longer since 'ownership of the claim' had 'passed to . . . [the] Japanese wife'. (M. S. Department of State, file 494.11 Barstow, Ebenezer, cited in Hackworth, *idem*.)

"The rule of continuity of nationality in a claim has also been followed by international tribunals. The United States-Mexican and Spanish-Mexican Commissions followed the traditional rule without deviation, and the 'rule is implicit in the provision in all the Rules of Procedure requiring the nationality of the owner or owners of the claim from the time of origin to the date of filing to be set forth in the memorial' (Feller, *supra*), p. 96) And the British-Mexican Commission stated that 'a claim must be founded upon an injury or wrong to a citizen of the claimant Government, and that title to that claim must have remained continuously in the hands of citizens of such Government until the time of its presentation for filing before the Commission.' (Case of *F. W. Flack*, Decisions and Opinions of Commissioners, p. 80 at 81, cited in Feller, *idem*.) Following this principle in the Case of *Edgardo Trucco* (Decision No. 1, unpublished), the latter Commission dismissed a claim for damage to property which had belonged to a British subject at the time of the injury but which had been left by will to a Mexican national prior to the filing of the claim. (Cited in Feller, *idem*.) Further, both the British-Mexican Commission in the case of *Minni Stevens Eschauzier* (Further Decisions and Opinions, [1933], p. 180[1] and the French-Mexican Commission in the case of *Maria Guadalupe A, Vve Markassuza* (Sentence No. 38, unpublished) required continuous nationality not only until the date of filing but subsequently to the date of the award. (Cited in Feller, *supra*, p. 97). In the former case it was stated at page 182:

> 'A state may not claim a pecuniary indemnity in respect of damages suffered by a private person on the territory of a foreign state unless the injured person was its national at the moment when the damage was caused and retains its nationality until the claim is decided.
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> 'Persons to whom the complainant state is entitled to afford diplomatic protection are for the present purpose assimilated to nationals.
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> 'In the event of the death of the injured person, a claim for a pecuniary indemnity already made by the state whose national he was can only be maintained for the benefit of those heirs who are nationals of that state and to the extent to which they are interested.' (Quoted in Ralston, *supra*, p. 77).

And in the *Gleadell* case (Decisions and Opinions, [1931], 55[2]) a claim of British origin which did not preserve that character until its presentation before the same Commission, as the residuary legatee

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[1 See *Annual Digest*, 1931–1932, Case No. 110.]
[2 See *Annual Digest*, 1929–1930, Case No. 117.]

of the claim was an American woman, was rejected even though the executor of the testator's estate was a British subject.' (Cited in Ralston, *idem*, and in Hackworth, *supra*, p. 805.)

" The instant claim lost its American nationality upon the death of Joseph Kren on April 21, 1948, and thereafter was impressed with the nationality of a non-citizen of the United States. It is clear, then, that under the policy of the United States this claim would not be espoused by it against Yugoslavia. Further, there is ample authority under the decisions of international tribunals that a claim must have a continuous national character from the date of its origin to the date of settlement.

" We are satisfied that the negotiators of the agreement of July 19, 1948, between the Governments of the United States and Yugoslavia, were aware of the policy of the United States Government and established principles of international law and had they desired to depart from them would have inserted appropriate provisions in the agreement. Since they did not, we conclude that a claim to be within the jurisdiction of this Commission must be owned by American nationals from the date the claim arose to the date the Agreement was signed.

" For the foregoing reasons this claim is denied in its entirety."

[Report: *Settlement of Claims*, 1949–1955, p. 46.]

State Responsibility—Claims—Nationality of—Whether Nationality of Nominal or of Beneficial Owner of Stock Relevant.

Binder-Haas Claim.

United States, International Claims Commission.[1]

The Facts.—This was a claim by Edwin Binder and three other United States nationals and one other person in respect of 7,500 shares of Dugaresa stock, which had been taken over by the Government of Yugoslavia in 1945. The shares were owned by Etexco, a Swiss corporation, which in turn was owned by the claimants Ann Unger, Robert Anninger, Victor Anniger and Lise Haas in equal shares. In 1941, these four had transferred their holdings in Etexco to Binder, to hold " not as holder in fact but as ostensible owner ". The document comprising the transfer bore the signature of Binder in confirmation of the understanding which included an agreement that Binder would return the shares to the four owners on demand.

Under Article 2 of the Claims Agreement of 1948 between the Governments of the United States and Yugoslavia,

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

> " The claims of nationals of the United States to which reference is made in Article 1 of this Agreement include those respecting property, and rights and interests in and with respect to property, which at the time of nationalization or other taking were:
>
> > " (A) Directly owned by an individual who at such time was a national of the United States.
> >
> > " (B) Directly owned by a juridical person organized under the laws of the United States, or a constituent state or other political entity thereof, 20 percent or more of any class of the outstanding securities of which were at such time owned by individual nationals of the United States, directly, or indirectly through interests in one or more juridical persons of whatever nationality, or otherwise; or
> >
> > " (C) Indirectly owned by . . . a juridical person within category (B) above, through interests, direct, or indirect in one or more juridical persons not within category (B) above, or otherwise."

The claimants contended that under Swiss law Binder was the sole owner of the shares, that is, the Dugaresa shares, through his ownership of the Etexco shares, and that as a United States citizen he had standing to maintain his claim. Under American law, it was argued, Binder was a constructive trustee for predominantly American beneficiaries (one of the four, Lise Haas, not being an American citizen), and that the legislative history of the International Claims Settlement Act of 1949 showed an intention to recognize in their entirety claims by " juridical trustees ". It was also contended that there was a specific understanding by the negotiators of the Agreement of July 19, 1948, between the United States and Yugoslav Governments that the " Binder-Haas " claim was to be recognized as part of a claim asserted by Binder on behalf of all four beneficial owners.

Held: that Binder was not entitled to make this claim on his own behalf; it must therefore be regarded as a claim by the four other persons mentioned—they being the real or beneficial owners. As Lise Haas was not a United States citizen, her claim must fail. That of the other three claimants succeeded.

The Commission said: " As the claimants themselves have stated in their memorandum concerning the eligibility of the Binder-Haas claim, the important point is to ascertain the real intention of the parties [to the Yugoslav Claims Agreement of 1948]. It is our view that the claims encompassed by the agreement are solely and exclusively claims of nationals of the United States on account of their direct and indirect interests in ' property and rights and interests in and with respect to property ' in Yugoslavia which were taken by the Government of Yugoslavia. Claimants eligible to participate in the fund are defined in Article 2 of the International Claims Settlement Act of 1949, subparagraph (c) of which provides that there are included claims of nationals of the United States respecting property, and rights and interests in and with respect to property, which at the time of nationalization or other taking were—

> "Indirectly owned by an individual within category (A) above, or by a juridical person within category (B) above, through interests direct or indirect in one or more juridical persons not within category (B) above, or otherwise.

"It cannot be accepted that the ostensible owner of the Etexco shares, Binder, was a 'juridical trustee', for clearly the relationship between Binder and the true owners of Etexco did not create a juridical person 'organized under the laws of the United States, or a constituent state or other political entity thereof' as contemplated by the Act. We also understand that he could not be considered as a 'juridical person' under the laws of Switzerland. It follows that those American nationals who at the time of the taking of Dugaresa indirectly owned an interest therein through Etexco, a juridical person not within category (B) because it was a Swiss corporation, are eligible claimants but nonnationals are not. The Commission, therefore, views this claim as one by the real or beneficial owners of the Etexco shares and not as a claim by Binder on his own behalf."

[Report: *Settlement of Claims*, 1949–1955, p. 45.]

D—DAMAGES (MEASURE OF DAMAGES)

I.—Award of Damages in General. Grounds for Awarding Damages

State Responsibility—Damages—Amount of Award—Whether Limited to Amount of Claim—Application of Principles of Justice and Equity.

SCHUETZ CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—In this claim, the applicant pleaded that he was not able to give in his statement of claim the value, as at the date of seizure, of certain property belonging to him which had been seized by the Yugoslav Government. He filed certain evidence which tended to show that the property was worth at least $10,880, but the value may well have been greater.

Held: that the Commission could, in a suitable case, make an award which was larger than the amount of the claim.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

The Commission said: "We cannot overlook the fact, abundantly apparent from the Commission's records, that many claimants have been absent from Yugoslavia for many years and, consequently, out of touch with the values of property there, even when continuing contact with those using their property Many of them have stated that they have no appropriate conception, or knowledge, of the actual value of their property, particularly as of the time of the taking. They were nevertheless, required to state in their statement of claim filed with the Commission 'the amount of the claim' (item (m)). It seems obviously unjust under such circumstances, to hold the claimant to such a statement made adjunctly, as it was in many cases, as a mere matter of speculation, where the actual valuation of the property upon the evidence proves to be in excess of the amount so claimed. This is feasibly corroborated by the modern liberalization of the rules of pleading to permit amendment after the submission of the evidence to conform the pleadings to the proof. We are directed, moreover, by the law establishing the Commission to apply in the decision of the claims within our jurisdiction 'the applicable principles of international law, justice and equity.' Such principles dictate the allowance of the claim, if otherwise judicially valid, for the amount determined as the value of the property taken even though it had earlier been apparently appraised at a smaller amount by a claimant unacquainted with the necessary facts. We, therefore, hold that the valuation supported by the evidence will be employed as the basis for the award herein."

[Report: *Settlement of Claims*, 1949–1955, p. 21.]

NOTE.—See also the *Ketterer Claim* (*ibid.*, p. 44), in which the claimant filed a claim in respect of an interest in property which he described as a one-third share thereof, and the Commission established that he was in fact entitled to a one-half share. The Commission said: ". . . the claimant should not be bound by the lesser interest claimed, as suggested by the Government of Yugoslavia, because of an erroneous interpretation of the law and an apparent lack of knowledge of the degree of ownership recorded in his name in the appropriate land register. We hold, therefore, that the valuation and degree of interest therein supported by the evidence should be used. Such a finding accords with the principles of international law, justice, and equity which the Commission is bound to apply (International Claims Settlement Act of 1949, sec. 4 (a))."

State Responsibility—Measure of Damages—Obligation to Pay Compensation for Loss of Concessionary Rights—Cash Seized by Belligerent Occupant—Whether Repayable in Full.

See p. 628 (*Collas & Michel Claim*).

E—INTEREST

II.—Rate of Interest. Compound Interest

State Responsibility—Interest—Rate of Interest—*Dies a quo—Dies ad quem.*

SENSER CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—This was a claim for $3,950 in respect of property belonging to the claimant, a United States national, which was taken by the Yugoslav Government, The question having arisen whether, and if so, what, interest was payable on the amount claimed, the Commission took the opportunity of setting forth its reasons for granting interest on all awards and also of fixing the rate of interest, with the dates from and to which it should be paid.

Held: that interest at the rate of 6% per annum should be allowed from the date when the claimant's property was taken by the Yugoslav Government to August 21, 1948, the date when the Yugoslav Government paid into the United States Treasury the sum of $17,000,000 in discharge of all claims against Yugoslavia under the Agreement of July 19, 1948.

The Commission said: " Possible awards of interest are clearly contemplated by the Settlement Agreement of 1948, which provides in Art. 1 (c) for the return to Yugoslavia of any excess remaining of the proceeds of the original lump-sum settlement after the payment of the total of all claims awarded against it, ' exclusive of any interest on such claims for the period beginning on the date of the payment referred to in paragraph (a) of this article,' which refers to the payment of an agreed lump sum of $17,000,000, actually made August 21, 1948. By expressly excluding the allowance of interest after that date, the agreement contemplates by counterimplication jurisdiction to allow interest for appropriate periods prior to that time.

" Similarly, [section 8 (c) (5) of] the International Claims Settlement Act of 1949 also contemplates the allowance of interest on awards where otherwise appropriate. . . .

" Under settled principles of international law which, by the International Claims Settlement Act of 1949 the Commission is directed to apply (sec. 4 (a)), interest is clearly allowable on claims for compensation for the taking of property where, in the judgment of the adjudicating authority, considerations of equity and justice render such allowance appropriate.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

" ' Interest, according to the usage of nations, is a necessary part of a just national indemnification.' Moore, *Digest* (vol. VI), p. 1029.

" ' The question of the allowance of interest has arisen before almost every international tribunal, and usually, and except where the claim was for a tort purely, its allowance has been considered rightful, differences more frequently arising as to the time of its commencement or termination and the rate at which it should be allowed.' Ralston, *Law and Procedure*, section 212.

" ' But where the loss is either liquidated or the amount thereof capable of being ascertained with approximate accuracy through the application of established rules by computation merely, as of the " time when the actual loss occurred, such amount, so ascertained, plus damages in the nature of interest from the date of the loss, will ordinarily fill a fair measure of compensation. To this class, which for the purpose of this opinion will be designated ' property losses,' belong claims for property taken, damaged, or destroyed." Mixed Claims Commission, United States and Germany, *Administrative Decision No.* III (December 11, 1923), *Decisions and Opinions*, p. 62.[1] '

" ' The award of interest is usually considered to be merely a part of the duty to make full reparation . . . arbitral tribunals have felt that it was not outside of their jurisdiction to award interest, even though the Convention by which they were set up made no mention of interest. Where the treaty merely provides for the establishment of the amount of damages due, such action may be interpreted as an effort to restore the claimant as nearly as possible to the same position which he occupied before the injury was committed.' Eagleton, *The Responsibility of States in International Law*, pp. 203–4.

See, also, Whiteman, *Damages in International Law*, volume III, pp. 1913, *et seq.*; Hackworth, *Digest of International Law*, volume V, p. 735.

" It is our judgment that equity and justice require the allowance of interest, both under the Agreement with Yugoslavia and the applicable principles of international law. As to the rate at which allowable, we refer again to established principles of international law which suggest the use of the rate allowable in the country concerned.

" Yugoslavia, as is well-known, was unified after World War I from a number of previous constituent territories which had previously been portions of Serbia, Montenegro, Austria, Hungary, and other portions of the former Austro-Hungarian empire. Many of these constituent territories had local laws governing allowable rates of interest, which rates, in turn, varied according to the type of transaction involved. Variances existed, for example, on loans by business enterprises of the character of banks, co-operative organizations or insurance companies; or between other business enterprises; or between private creditors; and differed also as between transactions in which the interest rate was agreed upon and those in which interest was allowed by law, but without agreement on the rate between the parties. Up to the year 1946 these various rates ranged from 4 percent to as high as 12 percent. The rate has since been fixed by the Government of Yugoslavia at a maximum of 6 percent.

" It is not possible within the resources available to this Commission to determine the particular rate of interest applicable to each case of taking according to its location and other attendant circumstances which might affect the rate allowable under local law. We, accordingly, adopt a general rate of 6 percent as fair and equitable and within the general scope allowable by local law and in harmony with applicable principles of international law. Such rate of interest is to be allowed on all claims determined by this Commission from the date of the taking of the property concerned to August 21, 1948, the common determination date for the allowance of interest under the settlement agreement of that year."

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[1] See *Annual Digest*, 1923–1924, p. 211.]

[Report: *Settlement of Claims*, 1949–1955, p. 18.]

F—MISCELLANEOUS

State Responsibility—Miscellaneous—Foreign Exchange Controls —Refusal to Permit Transfer of Bank Deposits—Whether Violative of International Law.

TABAR CLAIM (NO. 3).

United States, International Claims Commission.[1]

THE FACTS.—The claimants, United States citizens, had before the Second World War deposited a sum of money amounting to 357,000 dinars in a Yugoslav bank. Since the war, they had endeavoured to transfer the money to the United States, but permission to do so had been refused by the Yugoslav Government under the exchange control laws, notably the Law Confirming and Amending the Law Pertaining to Regulation of Payments to Foreign Countries, of September 2, 1945 (No. 604, as amended, Official Gazette No. 86, October 25, 1946). The claimants made this refusal a ground of their claim for compensation.

Held: that the claim must fail. The refusal to permit the transfer of a bank deposit from Yugoslavia to the United States of America was not a taking of property under the Yugoslav Claims Agreement of 1948.

The Commission said: "Exchange controls usually follow a general pattern whereby residents, nationals as well as non-nationals, must surrender their foreign exchange, gold and foreign securities; foreign currency must not be exported, and domestic currency must not be exported or imported; nonresident creditors cannot have the sum owed transferred, irrespective of the currency involved; and rates for foreign exchange and gold are fixed by government decree.

"International law and the usual commercial treaties are no bar to exchange restrictions. So long as the control measures are not discriminatory, no principle of international law is violated.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211. n.1.

" Under the facts in this case, payment to the claimants was to be made in dinars. The bank account was an internal dinar account. Claimants had no right to receive dollar exchange. The Convention of Commerce and Navigation mentioned in Article 5 of the Yugoslav Claims Agreement of 1948 provides against discriminatory taxes or duties on property to be transferred out of the country involved; the convention does not prohibit the imposition of foreign exchange controls. As claimants' dinar deposit was not the result of a ' current ' international transaction, as that term is defined in the Articles of Agreement of the International Monetary Fund, the imposition of exchange control did not violate the agreement. A bank deposit is capital and the regulation of capital movements was reserved by this agreement to the member states.

" Claimants have produced no evidence that Yugoslav foreign exchange laws or their administration are discriminatory. The provisions of the Yugoslav post-war exchange control laws shows that they are not discriminatory. . . .

" Article 10 (b) of the Yugoslav Claims Agreement of 1948 takes cognizance of ' Yugoslav foreign exchange resources and regulations '. The Department of State must have been satisfied that these regulations did not violate any principle of international law; otherwise it would not have consented to the provision.

" By Article 11 of the same agreement the Government of Yugoslavia, in effect, agrees to waive its foreign exchange regulations to the extent of giving ' sympathetic consideration to applications for transfers to the United States of deposits in banks of Yugoslavia and other similar forms of capital owned by nationals of the United States, where the amounts involved are small, but which, in view of the circumstances, are of substantial importance to the persons requesting the transfer.' The inference to be drawn from this article as it relates to foreign exchange regulations is that the Department of State considered the regulations as being non-discriminatory, because the note from the Yugoslav Ambassador to the Secretary of State stated that Yugoslavia would ' consider means of discharging such obligations (dollar bonds) when Yugoslavia's economic condition, seriously impaired by the ravages of war, and her foreign exchange position permit.'

" In view of the foregoing, the refusal or failure to permit a transfer to the United States of claimants' deposit does not amount to ' nationalization ' or ' other taking ' of property or of rights in and with respect to property."

[Report: *Settlement of Claims*, 1949–1955, p. 35.]

PART VI

THE INDIVIDUAL IN INTERNATIONAL LAW

A—IN GENERAL

I.—Position of Individuals in International Law. Human Rights and Freedoms

[*See also* Part I, International Law in General: IV, Relation to Municipal Law; *and* Part VIII, Treaties: IX, Operation and Enforcement of Treaties.]

Individuals Position in International Law—Human Rights—Charter of the United Nations—International Law—Relation to Municipal Law.

Rice *v.* Sioux City Memorial Park Cemetery, Inc., *et al.*

United States, Supreme Court of Iowa. September 22, 1953.

The Facts.—The plaintiff entered into a contract with the defendant cemetery corporation to buy three burial plots. The contract limited burial privileges to " members of the Caucasian race ". The defendant refused to permit the burial of the plaintiff's deceased husband, who had been killed in the Korean conflict, on the ground that he was not a Caucasian. The decedent had 11/16 Indian blood and 5/16 white blood. The plaintiff brought an action for damages, alleging, *inter alia*, that the contract violated the provisions of the Charter of the United Nations relating to human rights and freedoms. The District Court held for the defendant. On appeal,

Held: that the decision of the District Court must be affirmed. The restriction of burial privileges to members of the Caucasian race did not violate either the United States or Iowa Constitution. The Charter of the United Nations did not supersede State laws relating to contracts.

The Court said: " But plaintiff further urges that the restrictive covenants violate ' public policy ' and the treaty embodied in the Charter of the United Nations.

" It will suffice to say that that treaty has no application to the private conduct of individual citizens of the United States. It is true a principle was enunciated in that treaty but claims or fears that state laws have been abrogated by the provisions of the Charter of the United Nations, have been dissolved by the California and Michigan courts. In *Sipes* v. *McGhee*, 316 Mich. 614, 25 N.W.2d

638, 644,[1] a case reviewed by the United States Supreme Court, there was a reversal on constitutional grounds but no criticism of the state court's expression as to the general law relative to treaties. The Michigan Supreme Court said:

> 'We do not understand it to be a principle of law that a treaty between sovereign nations is applicable to the contractual rights between citizens of the United States when a determination of these rights is sought in the State courts. So far as the instant case is concerned, these pronouncements (Art. 55, 56, United Nations Charter) are merely indicative of a desirable social trend and an objective devoutly to be desired by all well-thinking peoples.'

With this statement we agree.

"The Supreme Court of California in 38 Cal.2d 718, 242 P.2d 617, at page 622, reviewing the decision in *Sei Fujii* v. *State of California*, Cal.App., 217 P.2d 481,[2] held:

> 'We are satisfied, however, that the charter (United Nations) provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the Alien Land Law.'

"We also must come to the conclusion here that desirable as these principles announced in the charter may be, they do not have the force or effect of superseding our state laws relating to contracts, and must therefore hold that the provisions of the United Nations charter have no bearing on the case before the court."

[Reports: 245 Iowa 147, 60 N.W. 2d 110; *certiorari* granted, 347 U.S. 942, 74 Sup. Ct. 638, 98 L.Ed. 1091; affirmed, 348 U.S. 880, 75 Sup. Ct. 122, 99 L.Ed. 693; on rehearing, affirmance vacated and *certiorari* denied, 349 U.S. 70, 75 Sup. Ct. 614, 99 L.Ed. 507.]

NOTE.—(1) While the principal case was before the courts, the Iowa Legislature enacted a statute making it unlawful to deny interment to the remains of a deceased person solely because of his race or colour: Iowa Code Annotated, § 566A.8 (1954).

(2) The decision of the Supreme Court of Iowa is annotated in 3 A.L.R.2d 466 Supplement Service, and noted in *Georgetown Law Journal*, 42 (1954), p. 323; *Georgia Bar Journal*, 17 (1954), p. 253; *Iowa Law Review*, 39 (1954), p. 506; *Journal of Public Law*, 3 (1954), p. 272; *Miami Law Quarterly*, 8 (1954), p. 643; *Michigan Law Review*, 52 (1954), p. 907; *New York University Law Review*, 29 (1954), p. 1014; and *University of Pittsburgh Law Review*, 15 (1954), p. 522.

Individuals—Position in International Law—Rights under International Agreement—Nationals within Foreign Military Base—Persons Subject to Jurisdiction of Foreign Military Courts—Primary Jurisdiction of Foreign State—Residual Jurisdiction of Sovereign of Territory.

See p. 148 (*The People of the Philippines* v. *Segundo M. Acierto*).

[1] See *Annual Digest*, 1947, Case No. 35.]

[2] See *International Law Reports*, 1952, Case No. 53.]

Individual in International Law—Treaties Affecting Property Rights—Requirement of Municipal Legislation—" Pay As You Go " Agreement between Austria and United States of America.

See p. 431 (*" Pay As You Go " Agreement* (*Austria*) *Case*).

B—NATIONALITY

I.—In General. Proof of Nationality

Nationality—In General—Proof of Nationality—Effect of Consular Certificate.

See p. 52 (*Murarka et Al.* v. *Bachrack Bros., Inc.*).

II.—Acquisition of Nationality. Nationality as Affected by Changes of Sovereignty

Nationality—Acquisition of—On Marriage as Result of Automatic Loss of Nationality of Origin—Swiss Woman Marrying a French Subject—French Nationality Law of 1927—Failure to Make Declaration Requesting French Nationality—Whether Failure Results in Retention of Swiss Nationality—Retroactivity of Nationality Laws—The Law of France—The Law of Switzerland.

Procureur Général of the Court of Appeal of Besançon *v.* Ackermann, otherwise Coutal.

France, Cour de Cassation. January 26, 1953.

The Facts.—The respondent, a woman of Swiss nationality, married a French subject in 1933. The French Nationality Law of August 10, 1927, which was then in force, provided in Article 8 that a foreign woman marrying a Frenchman, without making the requisite declaration that she wished to acquire French nationality, nevertheless acquired that nationality if " her national law so decides ". It was proved that although there was no Swiss statute which made any such provision, there were decisions of the Swiss Federal Tribunal holding that a Swiss woman marrying a foreign national lost her Swiss nationality even if by the husband's national law she was only given the right to acquire his nationality (*e.g.*, to make a declaration to that effect). It was further proved that a judgment of the Swiss Federal Tribunal of February 9, 1940, reversed the previous jurisprudence and held that a Swiss woman did not lose her Swiss nationality on marrying a foreigner unless she thereby automatically acquired his nationality.[1]

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[1] It appears from the report that the Swiss Federal Tribunal reversed its previous line of decisions because it presumably had in mind foreign legislation, such as that enacted in France in 1938, which made the grant of French nationality to a foreign woman marrying a Frenchman dependent upon an affirmative decision of the competent French Minister, thus exposing a Swiss woman to the possible risk of statelessness.

The Court of first instance and the Court of Appeal (of Besançon) held that the respondent had acquired French nationality on her marriage in 1933 because according to Swiss law, as then expounded by the Swiss Federal Tribunal, she automatically lost her Swiss nationality, which brought into operation Article 8 of the French Nationality Law of 1927 whereby she acquired French nationality on the ground that " her national law so decided ". On behalf of the Procureur Général it was contended (i) that there was no Swiss " law " which provided that a Swiss woman should automatically lose her nationality on marrying a foreigner, and (ii) that as the later judgment of the Swiss Federal Tribunal (of February 9, 1940) held that a Swiss woman retained her nationality if she did not automatically acquire that of her husband, that judgment should be applied retroactively and the respondent's claim to French nationality rejected.

Held: (i) that the jurisprudence of the Swiss Federal Tribunal was equivalent to Swiss " law "; (ii) that the jurisprudence of the Swiss Federal Tribunal existing at the time of the marriage in 1933 must be applied, and that it was not permissible to give retroactive effect to the judgment of that Tribunal given in 1940; and (iii) that, accordingly, the judgment declaring the respondent to be a French national must be affirmed and the appeal dismissed.

The Court said: " It follows from Article 8 of the Law of August 10, 1927, that a foreign woman who has not made the requisite declaration acquires French nationality if her national law so decides. The judgment states that the Swiss Federal Tribunal, ' the highest judicial authority of the Confederation ', extended to the international field the principle of unity of nationality laid down in Article 161 of the Swiss Civil Code and held that a Swiss woman loses her nationality of origin if foreign law gives her the right to acquire the nationality of her husband by reason of the marriage. It has thus been found by the lower Court that the legal rules set out above, which originate in jurisprudence and custom, constitute the national law of the person here concerned just as much as a formal legislative enactment, the place of which they take. The contention that according to a judgment of the Swiss Federal Tribunal of February 9, 1940, a Swiss woman marrying a foreigner only loses her nationality if she actually acquires the husband's nationality by virtue of the marriage is ill-founded in the present case.. According to Article 4 of the [French] Nationality Law of October 19, 1945, which has been declared applicable, for the purpose of interpretation, to change of nationality occurring before the coming into operation of the said Law, the conditions relating to acquisition and loss of French nationality subsequent to the birth of a person are governed by the law in force on the date when the facts and acts resulting in such acquisition and loss actually take place. The French Law of 1927, which was in force when Mr. C. and Miss A.

were married, referred to the national law of the foreign woman as in force on the date of the said marriage. The Court of Appeal was right in holding that the change which occurred in 1940 cannot retroactively affect the legal position created by French law as applying at the time of the celebration of the marriage. The appeal must therefore be dismissed."

[Report: *Dalloz et Sirey*, 1955, *Jurisprudence*, p. 769.][1]

Nationality—Acquisition of—Adoption.

In *Thenan* v. *Council of State of the Canton of Valais*, decided on December 22, 1953, the Swiss Federal Tribunal, in considering the question of what law was applicable to the adoption of an alien child by a Swiss national, pointed out that adoption does not change the nationality of the child, and that accordingly it had always been considered desirable for the courts to take into account the law of the nationality of the child, even though in principle only Swiss law was applicable. [Report: *Arrêts du Tribunal fédéral suisse*, 1953, I, p. 321.]

Nationality—Acquisition of—Minor Children—Acquisition of Nationality by Parent—Death of Parent.

In re DEBECQUEVORT.

Belgium, Court of Cassation. *October* 5, 1953.

THE FACTS.—Claire Francq, a Belgian national, lost her Belgian nationality on marriage with a citizen of the Netherlands. On April 30, 1947, after the marriage had been dissolved by a divorce, she made the declaration of option provided for by Belgian law for the purpose of recovering Belgian nationality. Under Belgian law, that declaration then had to be approved by a court of law, and, if so approved, entered in a special register. Before these steps could be taken, on August 9, 1947, Claire Francq died, leaving a minor daughter. Nevertheless, the procedure started by her declaration of option was completed: on December 15, 1949, the Court of Appeal of Brussels approved that declaration, and it was entered in the register of the City of Brussels on February 9, 1950. Gabrielle Debecquevort, provisional guardian of Claire Francq's minor daughter, then sought to obtain for the child a certificate of Belgian nationality, in reliance on a provision of Belgian law concerning nationality to the effect that non-emancipated minor children acquire Belgian nationality when the parent in whose custody they are voluntarily acquires or recovers that nationality.

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[1] *Contra: Ministère Public* v. *Fusari*, a judgment of the Court of Appeal of Rabat (Morocco) of January 14, 1953, which took into account only the later jurisprudence of the Swiss Federal Tribunal, *viz.*, the judgment of February 9, 1940: *Dalloz et Sirey*, 1955, *Jurisprudence*, p. 783.

The certificate was refused, and the refusal was upheld by the Court of first instance. On appeal, the Court of Appeal of Brussels, by a decision of July 12, 1952, held that the child had Belgian nationality, and should be issued with a certificate of Belgian nationality.

The present proceedings were an appeal by the Procureur-Général, acting in the interest of the law, from that decision. In his pleadings the Procureur-Général advanced the following arguments: " Reading Articles 10, 19 and 20 of the Nationality Laws together, it appears that the declaration of option for the purpose of recovering Belgian nationality must be approved by a decision of a court of law, that the decision must be entered in the register mentioned in Article 22, and, finally, that the option takes effect only from the date of entry in the register, and is not retroactive. Accordingly, the declaration of option made by Claire Francq could not take effect in her lifetime, since it was not approved or entered in the register before her death. On the other hand, the eventual entry in the register of the decision of approval could not give effect to the option, since the effect which the law gives, without retroactivity, to the registration of the approval of a declaration of option, namely, the recovery of Belgian nationality, presupposes that the person whose option was approved is alive. The decision complained of thus wrongly deduced from the approval of the option of Claire Francq that the latter in fact recovered Belgian nationality.

" The decision complained of also wrongly considered that all the requirements of the law concerning the guardianship of Claire Francq over her minor daughter were satisfied. Even if the death of Claire Francq did not prevent her option from producing its effect, namely, the recovery of Belgian nationality, the mother, on the day this effect was in theory produced, did not exercise the rights of guardianship over her daughter since she was dead. The decision complained of tries to justify its conclusion by reference to the argument that the court, in approving *post mortem* the declaration made by Claire Francq, implicitly recognized that the latter must, for the purposes of the procedure and its consequences, be considered as having continued to exist and to exercise the rights of guardianship over her daughter. The Court of Appeal was not empowered to invoke such a fiction, which is not provided for in any law and which is, moreover, in conflict with the rule that the option only takes effect from the date of its registration, and then only for the future."

Held: that, for the reasons set out in the pleadings of the Procureur-Général, the decision of the Court of Appeal of Brussels of July 12, 1952, must be set aside.

[Report: *Pasicrisie belge,* 1954, I, p. 83.]

Nationality—Acquisition of—As the Result of Territorial Changes—Re-acquisition of Former Nationality by Persons who were Nationals of Territories which Lost their Independence and Subsequently Re-acquired it—Acquisition of German Nationality by Austrian Citizens as a result of Incorporation of Austria into German Reich—Re-Acquisition of Austrian Nationality after Severance of Austria from Reich—Whether Re-Acquisition Resulted in Loss of German Nationality—Liability to Extradition.

AUSTRIAN NATIONALITY CASE.

German Federal Republic, Court of Appeal of Frankfurt. June 2, 1953.

THE FACTS.—Article 16 (2) of the Constitution of the Federal Republic of Germany provides that German nationals may not be extradited. The applicant contested the right of the German authorities to extradite him, on the ground that he was a German national. He contended in that behalf that, as an Austrian national by origin who had acquired German nationality in 1938 by reason of the incorporation of Austria into the German Reich, he retained his German nationality notwithstanding the fact that the Austrian Transitional Nationality Law of July 10, 1945, provided for the re-acquisition of Austrian nationality by all persons of Austrian origin who had become German nationals in 1938. On behalf of the Public Prosecutor, it was contended that the applicant had lost his German nationality on re-acquiring Austrian nationality by virtue of the Austrian Law of July 10, 1945, and that he was therefore no longer a German national, with the result that he was liable to be extradited.

Held: that the applicant was no longer a German national and was therefore liable to be extradited.

The Court said: " The question whether former Austrian citizens who became Germans in 1938 again lost their German nationality when they re-acquired Austrian nationality in 1945, must be answered in accordance with German law. There is no legal enactment which provides for cases of this kind. The German Nationality Law of 1913 does not contain any provisions governing the nationality of inhabitants of territories incorporated into Germany and subsequently severed from German territory, and more especially it contains no provisions applicable to the incorporation of a whole State which subsequently becomes independent again. Nor has international law made any provision in the matter, and although a solution by treaty is envisaged, there is as yet no such treaty. . . . The Federal Constitutional Court and the Bavarian Court of Appeal seem to take the view that at least those Austrians who are living in Austria and who no longer have any citizenship contacts with Germany are no longer claimed as citizens by Germany, and have therefore lost their German nationality by virtue of the recognition of the legislation enacted by Austria. This Court adopts this view, at any rate in the case of a person who again became an Austrian citizen in 1945 and has been living in Austria since then, without maintaining any citizenship contacts with Germany. . . ."

[Report: NJW, 6 (1953), p. 1567.]

V.—Naturalization

Nationality—Loss of—By Naturalization in Foreign State—Palestine as Foreign State—The Law of the United States of America.

KLETTER *v.* DULLES.

United States, District Court, District of Columbia. April 17, 1953.

THE FACTS.—Kletter, the plaintiff in this action to secure a declaratory judgment that he was an American citizen, was born in Palestine. He came to the United States with his mother in 1921, and was residing with her when she was naturalized in 1928. Kletter was at that time a minor child. He obtained a United States passport in 1930 as an American citizen by representing in his application that his father was deceased. When he later made statements that his father was alive, the Department of State withdrew his passport on the ground that he would not have acquired United States nationality by the naturalization of his mother if his father was still living. In 1931, Kletter travelled to Palestine on an emergency *laissez-passer*. He acquired Palestinian citizenship in 1935 under Article 7 of the Palestinian Citizenship Order, 1925, by reason of his father's having been a Turkish subject, habitually resident in Palestine on August 1, 1925. The Palestine Citizenship Law of 1925 further provided that a minor child who obtained the nationality of some other country by the parent becoming a naturalized citizen of such other country ceased to be a Palestinian citizen.

Held: that the application must be refused. The plaintiff was at all times a citizen of Palestine and, even if he had become a citizen of the United States by the naturalization of his mother, he would have expatriated himself under the law of the United States by his subsequent naturalization in Palestine, which was a " foreign State " as regards the United States.

The Court said: " As already stated, the applicable law relating to the Palestinian citizenship claimed by plaintiff by virtue of his father being a Turkish subject, habitually resident in the territory of Palestine upon the first day of August 1925, is found in certain Palestinian citizenship orders, introduced in evidence in this cause.[1] Further provisions of Palestinian citizenship law of 1925, also in evidence, provide that a minor child who obtains the nationality of some other country by the parent becoming a naturalized citizen of such other country ceases to be a Palestinian citizen.[2] It would seem to follow conclusively that, if the plaintiff had derivative Palestinian citizenship from his father, he ceased to have such citizenship, if his mother's naturalization effectively made him an American citizen.

" It is the contention of the plaintiff that his mother's naturalization did effectively make him an American citizen, and, notwithstanding the above quoted provision of Palestinian citizenship law, he retained Palestinian citizenship, which makes his subsequent naturalization there a futile act, not effective to result in expatriation. The applicable statute in force at the time of the naturalization of plaintiff's mother, and upon which is based the plaintiff's claim to derivative American citizenship, is Section 8, Title 8, U.S.C.[3] Also in force at the time of plaintiff's naturalization in Palestine in 1935 was Section 17, Title 8, U.S.C.[4] It is the contention of plaintiff that the provision of the statute relating to the citizenship of a minor child resulting from the naturalization of ' the parent ' means the naturalization of either the child's father or mother. It is to be noted that the statute was amended by Act of May 24, 1934, so as to provide for derivative citizenship of a minor child by the naturalization of ' the father or mother '.[1] Prior to the amendment of 1934 the statute had repeatedly been given administrative interpretation that the word ' parent ' meant the father, if living, and no legal custody of the child had been acquired by the mother.[2] The same principle was recognized in judicial decisions rendered before the amendment of 1934.[3] Subsequent to the amendment of the statute in 1934, this Court, speaking through Judge Bailey, in *United States ex rel. Guest* v. *Perkins*, D.C., 17 F.Supp. 177, 180,[4] held that a minor child acquired American citizenship upon the repatriation of his mother, where the parents had separated by mutual consent, under an agreement in which the custody of the minor was given to the mother. In the course of that opinion, the report of the Senate Committee on the proposed amendment was quoted:

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[1] " 1.—(I) Turkish subjects habitually resident in the territory of Palestine upon the 1st day of August, 1925, shall become Palestinian citizens."

" 6. Save as provided in Articles 10 and 12 of this Order, for the purpose of Parts I and II of this Order the status of a married woman will be governed by that of her husband and the status of a child who has not attained the age of majority by that of its father." Palestinian Citizenship Orders, 1925 to 1941, Consolidated. [Section 1 comes under Part I, and Section 6 under Part II.]

[2] " Sec. 14 (1). Where a person ceases to be a Palestinian citizen, whether by declaration of alienage or otherwise, save in the case provided for by Article II of this order, every child of that person being a minor shall thereupon cease to be a Palestinian citizen, if such child has already obtained or obtains on its parent ceasing to be a Palestinian citizen, the Nationality of some other country." Flournoy & Hudson, Nationality Laws, pages 155–56.

" Sec. 15. A Palestinian citizen who, when in any foreign state and not under disability, by obtaining a certificate of naturalization or by any other voluntary and formal act, becomes naturalized therein, shall thenceforth be deemed to have ceased to be a Palestinian citizen." Ibid.

[3] Sec. 8. " . . . *children, born abroad, of alien parents, by naturalization of parent.* A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship by the parent, where such naturalization or resumption takes place during the minority of such child. . . . The citizenship of such minor child shall begin at the time such minor child begins to reside permanently in the United States." March 2, 1907, c. 2534, Sec. 5, 34 Stat. 1229.

[4] Sec. 17. " . . . *presumption.* Any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state. . . ." March 2, 1907, c. 2534, Secs. 2, 7, 34 Stat. 1229.

> ' Section 2 clarifies the present uncertainties of the law so that naturalization of an alien mother will confer United States citizenship upon her minor children born abroad who are admitted for permanent residence in the United States during their minority. The present law appears to confer United States citizenship upon such children but the uncertainty in the law makes necessary the clarifying language of the present bill.'

The opinion then states:

> ' I think that the amended act was passed not to change the former law but to clarify it, by expressing more clearly the intent of Congress.'

The contention of the plaintiff here is that in this view he did acquire American citizenship by virtue of his mother's naturalization, even though his father was then living and in the absence of any decree or agreement that his mother should have the custody of him. The answer to that is not without some doubt.[5] Of course, if the plaintiff did not acquire American citizenship by the naturalization of his mother, he is not now an American citizen, and the relief he seeks cannot be granted.

" Accepting the construction of the statute contended for by the plaintiff, however, and assuming that he did acquire American citizenship by the naturalization of his mother, he then immediately ceased to have Palestinian citizenship under Palestinian law. His contention that his subsequent Palestinian naturalization was a futile and unnecessary act is obviously without basis. Such naturalization, according to the Palestinian law, constituted an act of expatriation under American law, and he ceased then to be an American citizen. It makes no difference whether, in the course of that naturalization, he was required, by the law of Palestine, to take an oath of allegiance or only to make affirmation. The American statute of expatriation is in the disjunctive.[1] Either naturalization in any foreign state, in conformity with its laws, *or* the taking of an oath of allegiance to any foreign state constitutes expatriation. The contention of the plaintiff that Palestine, while under the League of Nations mandate, was not a foreign state within the meaning of the statute is wholly without merit.

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[1] " A child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of the naturalization of or resumption of American citizenship *by the father or the mother:* Provided, That such naturalization or resumption shall take place during the minority of such child: And provided further, That the citizenship of such minor child shall begin five years after the time such minor child begins to reside permanently in the United States." As amended May 24, 1934, c. 344, Sec. 2, 48 Stat. 797. 8 U.S.C. Sec. 8. [Emphasis supplied.]

[2] In the case of R. Bryan Owen, 36 Opinions of the Attorney General 197: In Citizenship of Minor Child, 37 Opinions of Attorney General 90. In the latter opinion Attorney General Mitchell stated at p. 94: " . . . It is my opinion that by virtue of the decree of divorce in this case the father has been permanently and definitely deprived of his legal status as a ' parent ' as effectively for the purposes of Section 5 of the Act of 1907 as if he were deceased."

[3] *In re Bishop*, D.C.W.D.Wash. 1927, 26 F.2d 148; *In re Citizenship Status of Minor*, D.C.N.J., 25 F.2d 210.

[[4] See *Annual Digest*, 1938-1940, Case No. 109.]

[5] [Omitted.]

" When the Congress speaks of a 'foreign State', it means a country which is not the United States, or its possession or colony—an alien country—other than our own, bearing in mind that the average American, when he speaks of a 'foreigner,' means an alien, non-American. *Uyeno* v. *Acheson*, D.C., 96 F.Supp. 510.

" Furthermore, it is not for the judiciary, but for the political branches of the Government to determine that Palestine at that time was a foreign state. This the Executive branch of the Government did in 1932 with respect to the operation of the most favored nations provision in treaties of commerce.[2]

" It is urged that American citizenship is a priceless possession and one ought not lightly to be deprived of it. That is indeed true, and it is equally true that it is such a priceless possession that one ought not to trifle with it, negate it and abjure it, as the plaintiff in this case has done. This is not the case of some one unlearned and ignorant, but one whose passion to return to his native land, and there to pursue the study of law, which led him to admission to the bar as an advocate before the civil courts of Palestine, and later to pursue his study of the law in the famous Inns of Courts in London, dominated and frustrated any rights he might have had to American citizenship."

[Report: 111 F. Supp. 593.]

NOTE.—For an unsuccessful attempt by the plaintiff in the above action to establish that he was a British subject, see *The King* v. *Ketter*, decided by the English Court of Criminal Appeal on February 2, 1939: [1940] 1 K.B. 787 (*Annual Digest*, 1938–1940, Case No. 21).

Nationality—Naturalization—Forcible Imposition of Nationality—Recognition of.

See p. 57 (*Lesser* v. *Rotterdamsche Bank and Kling and Others*).

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[1] See *supra*, [p. 252, n.4].

[2] Hackworth's Digest of International Law, Vol. 1, at pages 103 and 115.

VI.—Expatriation. Loss of Nationality

Nationality—Loss of—Expatriation—Effect of Military Service in Foreign Army—Whether Service Voluntary or Involuntary—Burden of Proof of Involuntariness of Service—The Law of the United States of America.

LEHMANN *v.* ACHESON.

United States, District Court, Eastern District, Pennsylvania. February 6, 1953.

Court of Appeals, Third Circuit. July 29, 1953.

THE FACTS.—Lehmann was born in the United States in 1921, of parents of Swiss nationality. He was taken by his mother to live in Switzerland in 1924. In 1939 he registered, as required by Swiss law, for compulsory military service in the Swiss Army. Early in 1941 he was told by the American Consulate in Basle that the Consulate could not assist him in getting to the United States or in avoiding Swiss military service. He did not present proof of United States citizenship at the Consulate, and did not register there as an American citizen. He was conscripted into the Swiss Army in July 1941, and thereafter took an oath of allegiance to Switzerland. He served for 511 days between 1941 and 1947.

In 1945 the United States Consulate denied Lehmann a visa to enter the United States on the ground that he had expatriated himself under the provisions of section 401 of the Nationality Act of 1940, 54 Stat. 1168, as amended (then in effect), which provided:

> " A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by: . . .
>
> " (b) Taking an oath or making an affirmation or other formal declaration of allegiance to a foreign state; or
>
> " (c) Entering, or serving in, the armed forces of a foreign state unless expressly authorized by the laws of the United States, if he has or acquires the nationality of such foreign state; . . . . . "

In 1946, the Consulate issued to him a Certificate of Loss of Nationality of the United States. Lehmann came to the United States in 1948 on a non-immigrant visa for the stated purpose of visiting his father, who had been naturalized in 1928. While in the United States, Lehmann brought an action against the Secretary of State for a declaratory judgment that he was a United States citizen.

Held (by the District Court): that judgment must be entered for the defendant. The plaintiff had not established that his military service in Switzerland and oath of allegiance to that country were involuntary. [Report: 109 F. Supp. 751.]

On appeal,

Held (by the Court of Appeals): that the judgment of the Court below must be reversed, with directions to enter an order declaring that Lehmann was a citizen of the United States. Conscription of one who was a national both of the United States and of a foreign country into the armed services of the latter was *prima facie* involuntary, and the defendant had the burden of establishing the contrary by clear and unequivocal proof. In view of the fact that the Convention of November 11, 1937, between the United States and Switzerland[1] authorized the latter to conscript persons such as Lehmann, and that he was subject to penal sanctions for refusal to submit to conscription. it was irrelevant that he had failed to protest against his induction.

The Court said: " 'Expatriation is a voluntary renunciation or abandonment of nationality and allegiance.' *Perkins* v. *Elg*, 1939, 307 U.S. 325, 334, 59 S.Ct. 884, 889, 83 L.Ed. 1320.[2]

" Conscription into the Army of a foreign government of one holding dual citizenship is sufficient to establish prima facie that his entry and service were involuntary. *Perri* v. *Dulles*, 3 Cir., 206 F.2d 586.

" It is well settled that expatriation under Sec. 401 (c) is 'limited to cases where the induction into the foreign military service may be said to have been voluntary.' *Dos Reis* v. *Nicolls*, 1 Cir., 1947, 161 F.2d 860, 861,[3] *Podea* v. *Acheson*, 2 Cir., 1950, 179 F.2d 306;[4] *Pandolfo* v. *Acheson*, 2 Cir., 1953, 202 F.2d 38; Cf. *Tomaya Kawakita* v. *United States*, 1952, 343 U.S. 717, 72 S.Ct. 950, 96 L.Ed. 1249.[5]

. . . . .

" An analysis of the District Court's opinion discloses that its determination was premised on acts of omission, rather than commission, on the part of Lehmann with respect to his service in the Swiss Army and attending circumstances.

" The omissions enumerated in the opinion were:

" (1) On his 1941 visit to the American consulate in Basel, Lehmann failed to furnish proof of his birth in the United States and failed to inquire how he could establish his American birth.

" (2) On that same visit he did not ask specifically for the protection of the American consulate and expressed no desire to register as an American citizen.

" (3) He did not protest at the time he entered the Swiss Army or at the time he took the oath of allegiance.

" With respect to these 'omissions' it need only be said that they were utterly irrelevant to the critical issue of 'voluntariness'.

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[1] Convention Relative to Military Obligations of Certain Persons Having Dual Nationality, signed at Berne, November 11, 1937; *T.S.* No. 943, 53 Stat. 1791; *L.N.T.S.*, vol. 193, p. 181.

[[2] See *Annual Digest*, 1938–1940, Case No. 116.]

[[3] *Ibid.*, 1947, Case No. 51.]

[[4] *Ibid.*, 1949, Case No. 58.]

[[5] See *International Law Reports*, 1951, Case No. 73.]

" Under the Convention of 1937, as a dual citizen of the United States and Switzerland, Lehmann was obliged to submit to conscription in the Swiss Army and the American consulate in Basel could not by any attempted intervention in his behalf have contravened the terms of the Convention, nor could Lehmann's protestations, no matter how formally registered with either the American consul or the Swiss authorities, have done so. Had Lehmann presented his American birth certificate and registered as an American citizen or sought, and even gained, the ' protection ' of the American consulate and had he protested to the latter and the Swiss officials —all these steps would have been nothing more than a ' magnificent gesture ', totally unavailing.

" Anent the criticism of Lehmann's failure to act or speak, as far as the operations of the Swiss military conscription laws were concerned, it brings to mind the immortal lines:

> ' The Moving Finger writes; and, having writ,
> Moves on; nor all your Piety nor Wit
> Shall lure it back to cancel half a Line,
> Nor all your Tears wash out a Word of it.'
>
> Rubáiyát, Stanza 71

" Similarly irrelevant to the issue presented were the further omissions adverted to by the District Court that, on Lehmann's visit to the American consulate on January 11, 1946, when he was advised that he had expatriated himself by reason of his Swiss Army service and accordingly could not obtain a requested visa or passport to the United States, ' he made no protest nor did he make any statement that he desired retention of his American citizenship '; and, that when issued a Certificate of Loss of Nationality by the American consul on April 17, 1946, ' Again, he made no protest that his service in the Swiss Army was involuntary nor did he make any statement of any kind to the consul expressive of a desire to either retain or regain his American citizenship.'

" Again, with respect to these ' omissions ', no action or inaction on the part of Lehmann in 1946 could be properly considered in determining the issue in this case; they could not serve as a ' flashback ' to establish voluntariness on Lehmann's part in 1939 when he registered for military service, or in 1941 when he entered into military service. Furthermore, if Lehmann had not expatriated himself prior to 1946 and was therefore wrongly advised by the American consul that he had done so, the Government's mistake of law cannot provide a basis for his expatriation, *Podea* v. *Acheson*, *supra*, since his then conduct was in reliance upon, and pursuant to, the Government's error.

" Upon consideration of the record we are of the opinion that the District Court erred in its determination that Lehmann had expatriated himself from United States citizenship. The Government has failed to rebut the presumption that his entry and service in the Swiss Army as a result of his conscription were involuntary. With respect to the taking of the oath of allegiance to Switzerland, that action was but a concomitant of his conscription. Moreover, it was meaningless since by reason of his Swiss parentage he was already a citizen of Switzerland and his taking of the oath of allegiance did not change a pre-existing status. On that score it is significant that the Swiss oath of allegiance did not embrace a renunciation of his allegiance to the United States. Even had it done so, under our ruling in *Doreau* v. *Marshall*, . . . it would not have entailed ' . . . [an] authentic abandonment of his own [United States] nationality '[1], since the taking of the oath was but an incident to the conscription to which Lehmann was subjected.[2]

" The District Court premised its disposition on its finding that Lehmann's ' . . . actions were entirely consistent with an election on his part to choose Swiss nationality and in nowise reflected an intensity of purpose on his part to retain his American citizenship.' [109 F.Supp. 754.] The District Court erred in this respect. As was stated in *Tomaya Kawakita* v. *United States*, *supra*, 343 U.S. at pages 723, 725, 72 S.Ct. at page 956, 96 L.Ed. 1249, ' The concept of dual citizenship recognizes that a person may have and exercise rights of nationality in two countries *and be subject to the responsibilities of both* ', and ' As we have said, dual citizenship presupposes rights of citizenship in each country. *It could not exist if the assertion of rights or the assumption of liabilities of one were deemed inconsistent with the maintenance of the other.*' (Emphasis supplied.)

" Lehmann's actions were certainly within the periphery of the principles stated. As a Swiss citizen he was required to submit to its conscription laws and that apart from the factor that he would have been subjected to punishment had he done otherwise. We can see nothing in the record which could possibly justify a finding that Lehmann did aught but what was obligatory upon him by virtue of his dual citizenship under the laws of Switzerland. Further, the evidence is undisputed that in 1941 before his service in the Swiss Army he attempted to return to the United States so as to join the United States Air Force. That action certainly demonstrated his loyalty and allegiance to the United States.

" It was the District Court's view that Lehmann bore the burden of establishing that his service in the Swiss Army and his taking of an oath of allegiance to Switzerland were involuntary.[1] In that respect the District Court erred. On the contrary, as we earlier stated, conscription into a foreign army of one holding dual citizenship is sufficient to establish *prima facie* that the entry into and the service in that Army were involuntary. As already noted the Government failed in its obligation to rebut that presumption. Additionally, it may be noted that it has long been established that the burden of proving expatriation generally is upon the defendant who affirmatively alleges it and the burden is a 'heavy' one. *Bauer* v. *Clark*, 7 Cir., 1947, 161 F.2d 397, *certiorari* denied 332 U.S. 839, 68 S.Ct. 210, 92 L.Ed. 411, rehearing denied 332 U.S. 849, 68 S.Ct. 342, 92 L.Ed. 419 [see also *Annual Digest*, 1947, p. 118]. The Government has completely failed in this respect.

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[1] " If by reason of extraordinary circumstances amounting to true duress, an American national is forced into the formalities of citizenship of another country, the *sine qua non* of expatriation is lacking. There is not authentic abandonment of his own nationality. His act, if it can be called his act, is involuntary. He cannot be truly said to be manifesting an intention of renouncing his country." *Doreau* v. *Marshall*, 3 Cir., 1948, 170 F.2d 721, 724 [*Annual Digest*, 1948, Case No. 64].

[2] *Perri v. Dulles*, 3 Cir., 206 F.2d 586.

"We cannot refrain from the comment that the Government's position in this case is an anomalous one in view of its recent action in *Mandoli* v. *Acheson*, 1952, 344 U.S. 133, 73 S.Ct. 135.[2] There the Government had persuaded the District Court to rule that the mere fact of conscription into the Italian Army of one holding dual citizenship in the United States and Italy was insufficient to establish involuntariness. However, it abandoned its position on appeal to the United States Court of Appeals for the District of Columbia, conceding that the service of a dual citizen in the Italian Army and the taking of an oath of allegiance to Italy as a result of conscription were involuntary. The Supreme Court noted that fact with apparent approval in its opinion,[3] and referred therein in footnote 3, 344 U.S. at page 135, 73 S.Ct. 135, to 41 Op.Atty. Gen. Op. No. 16 (May 8, 1951). In the latter, the Attorney General held that a United States citizen required by the law of another country (Italy) to serve in its armed forces and, while so serving, to take an oath of allegiance to its sovereign, acted under duress and accordingly did not expatriate himself by his conduct.

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[1] It must be noted that the Government did not assert nor rely on Section 402, 8 U.S.C.A. § 802, as lending any support to its contention that Lehmann had lost his citizenship. That Section provides that a national of the United States who was born in the United States "shall be presumed to have expatriated himself under subsection (c) or (d) of section 401, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state . . . and such presumption shall exist until overcome whether or not the individual has returned to the United States." On that score it must be observed that it was held in *Tomaya Kawakita* v. *United States*, 1952, 343 U.S. 717 at page 730, 72 S.Ct. at page 959, 96 L.Ed. 1249, "Section 402 does not enlarge § 401 (c) or (d); it creates a rebuttable presumption of expatriation; and when it is shown that the citizen did no act which brought him under § 401 (c) or (d), the presumption is overcome. On that showing the person never loses his American nationality. . . . In other words, once it was shown that petitioner was not expatriated under § 401 (c) or (d), the force of § 402 was spent."

[[2] See *International Law Reports*, 1951, Case No. 64.]

[3] The Supreme Court, in referring to the fact that the District Court had also found that Mandoli's service in the Italian Army, under conscription, was voluntary and that he then took an oath of allegiance to the King of Italy, stated, 344 U.S. at page 135, 73 S.Ct. at page 136 [quotation omitted].

" We can see no valid reason for making any distinction between service by conscription in the Italian Army and service by conscription in the Swiss Army, for in both instances the conscript acts under compulsion of law and the duress of penal sanctions in the event of non-compliance.

" One final observation may be made.

" The Supreme Court has in the recent past afforded an illuminating guide in the consideration of issues similar to those presented here.

" In speaking of the grant of citizenship—by the naturalization process—the Supreme Court stated in *Schneiderman* v. *United States*, 1943, 320 U.S. 118, 125, 63 S.Ct. 1333, 1336, 87 L.Ed. 1796, ' To set aside such a grant the evidence must be " clear, unequivocal and convincing "—" it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt ". . . . This is so because rights once conferred should not be lightly revoked. And more especially is this true when the rights are precious and when they are conferred by solemn adjudication, as is the situation when citizenship is granted.'

" These principles were reaffirmed in *Baumgartner* v. *United States*, 1944, 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525. There the Supreme Court stated, 322 U.S. at page 670, 64 S.Ct. at page 1243:

> ' The measure of proof requisite to denaturalize a citizen was before this Court in Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796. It was there held that proof to bring about a loss of citizenship must be clear and unequivocal, We cannot escape the conviction that the case made out by the Government lacks that solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen.'

" It cannot be gainsaid that what is true of the rights of a naturalized citizen is equally, if not more, true of the rights of one who is blessed with the gift of citizenship by the Constitution of the United States by virtue of his birth in the United States."

[Report: 206 F.2d 592.]

Note.—For other cases involving expatriation by foreign military service or by voting in a foreign election, or both, see *Pandolfo* v. *Acheson*, 202 F.2d 38 (2d Cir. 1953) (military service); *Acheson* v. *Maenza*, 202 F.2d 453 (D.C. Cir. 1953) (military service); *Katsumi Yoshida* v. *Dulles*, 116 F.Supp. 618 (D. Hawaii 1953) (military service); *Takehara* v. *Dulles*, 205 F.2d 560 (9th Cir. 1953) (voting); *Longobardi* v. *Dulles*, 204 F.2d 407 (D.C. Cir. 1953) (voting); *Application of Bernasconi*, 113 F.Supp. 71 (N.D. Calif. 1953) (voting); *Takano* v. *Dulles*, 116 F.Supp. 307 (D.Hawaii 1953) (voting); *Perri* v. *Dulles*, 206 F.2d 586 (3d Cit. 1953) (military service and voting); *Kiyokuro Okimura* v. *Acheson*, 111 F.Supp. 303 (D. Hawaii 1953) (military service and voting); *Hisao Murata* v. *Acheson*, 111 F.Supp. 306 (D. Hawaii 1953) (military service and voting); *Harue*

Sakamoto v. *Dulles*, 111 F. Supp. 309 (D. Hawaii 1953) (military service); *Scardino* v. *Acheson*, 113 F.Supp. 754 (D.N.J. 1953) (military service and voting).

Nationality—Loss of—Deprivation of Nationality—Persons Having Acquired Nationality from a Belgian Parent—The Law of Belgium.

In re HUBERT AND TRIOMPHE.

Belgium, Court of Cassation. March 16, 1953.

THE FACTS.—Article 18 *bis* of the Belgian Consolidated Laws concerning the acquisition, loss and recovery of nationality provides:

> " A Belgian who did not acquire his nationality from a parent of Belgian nationality at the time of his birth may be deprived of that nationality, at the instance of the Public Prosecutor, if he is guilty of a serious breach of the duties incumbent on a Belgian citizen."

In application of that provision Umberto Hubert and Léon Triomphe were, by judgments of the Court of Appeal of Liège of January 29, 1952, deprived of their Belgian nationality. Both had been born outside Belgium. They were illegitimate sons of foreign mothers; but, on the subsequent marriage of their respective parents and their legitimation, they had acquired the Belgian nationality of their fathers. The Court of Cassation was now asked, at the instance of the Minister of Justice, to annul the decisions of the Court of Appeal of Liège on the ground that the fathers of both the persons concerned had Belgian nationality at the time of their birth and that therefore they could not be deprived of Belgian nationality on the basis of Article 18 *bis* of the Consolidated Laws.

Held: that the argument put forward on behalf of the Minister of Justice must be accepted, and the two decisions of the lower Court annulled.

[Report: *Pasicrisie belge*, 1953, I, p. 544.]

VIII.—Double Nationality

Nationality—Double Nationality—Law Governing Legal Procedure in Proceedings Concerning Dual Nationals—Adoption—The Law of Greece.

ADOPTION (DOUBLE NATIONALITY) CASE.

Greece, Tribunal of First Instance of Athens. 1953.

THE FACTS.—This was a petition for legalization of an adoption by a naturalized citizen of the United States of America of Greek origin, who had not lost his Greek nationality. He was domiciled in the United States, having lost his former Greek domicile.

Held: that the petition should be allowed on compliance with the formalities required by Greek law.

The Court said: " The petitioner declares that he was naturalized in the United States of America. *Prima facie*, then, it would have been necessary, under Article 23 of the Civil Code, to enquire what the requirements of American law were for a valid adoption. However, it appears that the petitioner had not lost his Greek nationality, because the authorization of the Greek Government necessary for the loss of that nationality was never obtained (*cf.* Article 23 of the Civil Law of 1856, amended by Law No. 120 of 1913). He therefore retains Greek nationality. Consequently, and in accordance with Article 31, § 1, of the Civil Code, as the petitioner has both Greek and a foreign nationality the adoption is governed by our national law. It is therefore necessary to examine the provisions of that law to ascertain whether the necessary conditions are present for the legalization of this adoption, seeing that the person whom it is desired to adopt, a female under age, is also a Greek national (Article 23 of the Civil Code).

" Before the adoption can be valid, Article 1576 of the Civil Code requires the consent of the adoptive father to be given by him in person before the Court. The petitioner is domiciled in America, and as it is impossible for him to appear before this Court, he applies for an order for his personal appearance before a Commissioner of the Court (*rapporteur*)—the Greek Consul nearest to the place where he lives—so that he may draw up his consent to the adoption.

" Under Articles 15, 309 and 377 of the Code of Civil Procedure, the Court, in order to undertake special matters, such as the making before it of a declaration of intention to adopt, may entrust the receiving of the consent of the adopting parent to a commissioner at the place of residence of the party in question when the latter is unavoidably prevented from appearing before the Court, as, for instance, when he lives in a foreign country (see Opinion of the Procureur of the Court of Cassation No. 50 of 1949, *Journal des Juristes Hellènes*, vol. XVII, p. 63, and decision of the Court of Appeal of Patras, No. 14 of 1949, *ibid.*, vol. XVI, p. 3209; decision of the Court of First Instance of Chio, No. 266 of 1947, *ibid.*, vol. XIV, p. 359; decision of the Court of First Instance of Kyparissia, No. 40 of 1952, *Thémis*, vol. LXIII, p. 903). That being so, the application for the nomination of a commissioner of the Court is granted and, under Article 89, § 1, III of the Presidential Decree of July 18/21, 1931, on the codification of Law 4952 etc., as officially interpreted by Law No. 5518 of 1932, the Greek Consul at Chicago is nominated accordingly.

" Article 1573 of the Civil Code requires that the consent of the spouse of the adopting parent shall be given either by notarial act or by a declaration made before the Court at the time of the adoption. In this case, the wife of the petitioner by her marriage with him acquired Greek nationality (Article 2 of the Law of 1856); her declaration of consent to the proposed adoption by her husband must therefore be in Greek form (*viz.*, Article 31, § 1, of the Civil Code). She may, under the provisions cited above, declare her consent before a notary at the place where she lives; it will not be necessary to nominate a commissioner of the Court for her.

[Report: *Revue Hellénique de Droit International*, 7 (1954), p. 291.]

Nationality—Double Nationality—Relevance in Considering Claim Before Claims Commission.

See p. 230 (*Martincic Claim*).

IX.—Nationality of Married Women

Nationality—Of Married Women—Acquisition of Nationality on Marriage as Result of Automatic Loss of Nationality of Origin.

See p. 246 (*Procureur Général of the Court of Appeal of Besançon* v. *Ackermann, otherwise Coutal*).

XII.—Nationality of Corporations

[*See also* PART XI, WAR AND NEUTRALITY: A, VI, Enemy Character.]

Nationality—Of Corporations—Relevance of Nationality of Shareholders—Liability to French "National Solidarity Tax"—The Law of France.

ENREGISTREMENT *v.* SOCIÉTÉ M.

France, Cour de Cassation. October 20, 1953.

THE FACTS.—A decree of the French Provisional Government, dated August 15, 1945, instituted a so-called "national solidarity tax" which, as far as here material, could be levied on French limited companies. A subsequent decree (of December 31, 1945) provided that the tax could also be levied on the assets of French limited companies situate in Algeria. The respondent Company had its head office in France (where it was also registered) and carried on business in Algeria. The tax was accordingly levied on its assets in Algeria. An Algerian Court held that as the only two shareholders were Spanish nationals, the Company was in effect a Spanish company and as such not liable to the tax. The revenue authorities appealed, contending that the nationality of a limited company was that of the country in which it was incorporated, and that the nationality of the shareholders was immaterial.

Held: that the place of incorporation determined the nationality of the Company, and that the latter was therefore liable to the tax.

The Court said: "According to Article 3 of the decree of December 31, 1945, the exceptional levy is applicable to assets situate in

Algeria and owned by French limited companies which have their registered office (*siège social*) in France. . . . The M. limited company, formed in accordance with the Law of March 7, 1925, is registered in metropolitan France and has its main business establishments in Algeria. The Court below held that the property of the Company situate in Algeria was not subject to the exceptional levy to which French companies are subject. It so held on the ground that, so far as concerns the application of the decree of December 31, 1945, the nationality of the Company must be determined in accordance with that of the individuals who control it: as there were only two shareholders, both Spanish nationals, the Company itself possessed Spanish nationality. In so holding the Court below acted contrary to the provision referred to above, and its judgment must be reversed."

[Report: *Clunet*, 81 (1954), p. 756.][1]

Nationality—Of Corporations—Relevance for Purpose of International Claims—Nationality of Beneficial Owners of Stock.

See p. 226 (*Westhold Corporation Claim*).

Nationality—Of Corporations—Relevance for Purpose of International Claims—Nationality of Beneficial Owners of Stock.

See p. 236 (*Binder-Haas Claim*).

C—ALIENS

I.—Admission of Aliens

Aliens—Admission of—Exclusion of Alien Previously Resident in the State from which Excluded—Necessity of a Hearing—Discretion of the Executive Department—Use of Confidential Information—Effect of Continued Detention of Alien at Immigration Station—The Law of the United States of America.

SHAUGHNESSY *v.* UNITED STATES *EX REL.* MEZEI.

United States, District Court, Southern District, New York. November 9, 1951.

Court of Appeals, Second Circuit. March 20, 1952.

Supreme Court. March 16, 1953.

(Vinson C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton JJ.)

THE FACTS.—Mezei was, it would seem, born in Gibraltar of Hungarian or Roumanian parents and lived in the United States from 1923 to 1948. In May 1948 he sailed for Europe, apparently to visit his dying mother in Roumania. Denied entry there, he remained in Hungary for some 19 months because of " difficulty in securing an exit permit ". Finally, armed with a quota immigration visa, he arrived at New York in February 1950. He was temporarily excluded from the United States by an immigration inspector acting pursuant to the Passport Act as amended and regulations thereunder. After reviewing the evidence, the Attorney-General in May 1950 ordered the exclusion of Mezei to be made permanent without a hearing, on the " basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest ".

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[1] The decision of the Court as set out above made it unnecessary to determine the subsidiary question whether Spanish nationals were exempt from the tax by virtue of Article 4 of the Franco-Spanish Treaty of January 7, 1862, which provides for the exemption of Spanish nationals from " war taxes and other extraordinary contributions ".

All efforts to effect the departure of Mezei failed. He attempted twice to return to Europe, but France and Great Britain refused him permission to land. The Department of State negotiated for his readmission to Hungary without success. Mezei applied for entry to twelve Latin-American countries, but was rejected by all of them.

Mezei sought his release from Ellis Island by habeas corpus proceedings, on the ground that he was unlawfully confined. Four of these attempts were unsuccessful. On a further petition for a writ of habeas corpus :

Held (by the District Court): that the petitioner must be released. Further detention after 21 months would be excessive and justifiable only by affirmative proof of the petitioner's danger to the public safety. When the Government declined to divulge such evidence, even *in camera*, the District Court directed the conditional parole of Mezei on bond. [Report: 101 F. Supp. 66.]

On appeal,

Held (by the Court of Appeals): that the judgment of the Court below must be affirmed, but the case remanded for a hearing on the question of the reasonableness of the conditions set on Mezei's release. To continue an alien's confinement beyond the time when deportation becomes impossible and without granting him a hearing is to deprive him of his liberty without due process of law. [Report: 195 F.2d 964.]

The Government petitioned for *certiorari* to the Supreme Court, and this was granted (344 U.S. 809).

Held (by the Supreme Court): that the judgment of the Court below must be reversed. Mezei had the status of an entrant alien, and the Attorney-General could accordingly exclude him without a hearing and without divulging the information upon which his determination was based. His continued detention on Ellis Island could not give the petitioner any greater rights than if he had been required to stay aboard ship.

The Court said (*per* Clark J.): " Courts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control. *The Chinese Exclusion Case*, 130 U. S. 581 (1889); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893); *Knauff* v. *Shaughnessy*, 388 U. S. 537 (1950);[1] *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952).[2] In the exercise of these powers, Congress expressly authorized the President to impose additional restrictions on aliens entering or leaving the United States during periods of international tension and strife. That authorization, originally enacted in the Passport Act of 1918, continues in effect during the present emergency. Under it, the Attorney General, acting for the President, may shut out aliens whose 'entry would be prejudicial to the interests of the United States.'[3] And he may exclude without a hearing when the exclusion is based on confidential information the disclosure of which may be prejudicial to the public interest.[4] The Attorney General in this case proceeded in accord

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[[1] *Annual Digest*, 1949, Case No. 74.]

[[2] *International Law Reports*, 1952, Case No. 69.]

[3] Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252, 22 U.S.C. § 223, provides in pertinent part:

"When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—

"(a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; . . . ".

That authorization has been extended to cover the dates relevant in this case. 66 Stat. 54, 96, 137, 330. Pursuant to that authority, Presidential Proclamation No. 2523, 6 Fed. Reg. 5821, as promulgated in 1941 in part provided:

"No alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General."

The Secretary of State, with the concurrence of the Attorney General, issued applicable regulations codified as Part 175 of 8 CFR. Section 175.53 defines eleven categories of aliens whose entry is "deemed to be prejudical to the interests of the United States." That delegation of authority has been upheld. *Knauff* v. *Shaughnessy*, 338 U.S. 537 (1950). The regulations were ratified and confirmed by Presidential Proclamation No. 2850, 14 Fed. Reg. 5173, promulgated August 17, 1949.

[4] 8 CFR § 175.57 provides:

"§ 175.57. *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary with these provisions; he made the necessary determinations and barred the alien from entering the United States.

" It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law. *The Japanese Immigrant Case*, 189 U. S. 86, 100–101 (1903); *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49–50 (1950);[1] *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 598 (1953).[2] But an alien on the threshold of initial entry stands on a different footing: ' Whatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned.' *Knauff* v. *Shaughnessy*, *supra*, at 544; *Ekiu* v. *United States*, 142 U. S. 651, 660 (1892). And because the action of the executive officer under such authority is final and conclusive, the Attorney General cannot be compelled to disclose the evidence underlying his determinations in an exclusion case; ' it is not within the province of any court, unless expressly authorized by law, to review the determination of the political branch of the Government.' *Knauff* v. *Shaughnessy*, *supra*, at 543; *Ekiu* v. *United States*, *supra*, at 660. In a case such as this, courts cannot retry the determination of the Attorney General. *Knauff* v. *Shaughnessy*, *supra*, at 546; *Ludecke* v. *Watkins*, 335 U. S. 160, 171–172 (1948).[3]

" Neither respondent's harborage on Ellis Island nor his prior residence here transforms this into something other than an exclusion proceeding. Concededly, his movements are restrained by authority of the United States, and he may by habeas corpus test the validity of his exclusion. But that is true whether he enjoys temporary refuge on land, *Ekiu* v. *United States*, *supra*, or remains continuously aboard ship. *United States* v. *Jung Ah Lung*, 124 U. S. 621, 626 (1888); *Chin Yow* v. *United States*, 208 U. S. 8, 12 (1908). In sum, harborage at Ellis Island is not an entry into the United States. *Kaplan* v. *Tod*, 267 U. S. 228, 230 (1925); *United States* v. *Ju Toy*, 198 U. S. 253, 263 (1905); *Ekiu* v. *United States*, *supra*, at 661. For purposes of the immigration laws, moreover, the legal incidents of an alien's entry remain unaltered whether he has been here once before or not. He is an entering alien just the same, and may be

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of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

" (b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

[[1] *International Law Reports*, 1950, Case No. 76.]

[[2] See *infra*, p. 343.]

[[3] *Annual Digest*, 1948, Case No. 166.]

excluded if unqualified for admission under existing immigration laws. *E.g., Lem Moon Sing* v. *United States*, 158 U. S. 538, 547–548 (1895); *Polymeris* v. *Trudell*, 284 U. S. 279 (1932).[1]

" To be sure, a lawful resident alien may not captiously be deprived of his constitutional rights to procedural due process. *Kwong Hai Chew* v. *Colding*, 344 U. S. 590, 601 (1953)[2]; *cf. Delgadillo* v. *Carmichael*, 332 U. S. 388 (1947).[3] Only the other day we held that under some circumstances temporary absence from our shores cannot constitutionally deprive a returning lawfully resident alien of his right to be heard. *Kwong Hai Chew* v. *Colding*, *supra*. Chew, an alien seaman admitted by an Act of Congress to permanent residence in the United States, signed articles of maritime employment as chief steward on a vessel of American registry with home port in New York City. Though cleared by the Coast Guard for his voyage, on his return from four months at sea he was ' excluded ' without a hearing on security grounds. On the facts of that case, including reference to § 307 (d) (2) of the Nationality Act of 1940, we felt justified in ' assimilating ' his status for constitutional purposes to that of continuously present alien residents entitled to hearings at least before an executive or administrative tribunal. *Id.*, at 596, 599–601. Accordingly, to escape constitutional conflict we held the administrative regulations authorizing exclusion without hearing in certain security cases inapplicable to aliens so protected by the Fifth Amendment. *Id.*, at 600.

" But respondent's history here drastically differs from that disclosed in Chew's case. Unlike Chew who with full security clearance and documentation pursued his vocation for four months aboard an American ship, respondent, apparently without authorization or reentry papers,[4] simply left the United States and remained behind the Iron Curtain for 19 months. Moreover, while § 307 of the 1940 Nationality Act regards maritime service such as Chew's to be continuous residence for naturalization purposes, that section deems protracted absence such as respondent's a clear break in an alien's continuous residence here.[5] In such circumstances, we have no difficulty in holding respondent an entrant alien or ' assimilated to [that] status ' for constitutional purposes. *Id.*, at 599. That being so, the Attorney General may lawfully exclude respondent without a hearing as authorized by the emergency regulations

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[[1] *Annual Digest*, 1931–1932, Case No. 138.]

[[2] See *infra*, p. 343.]

[[3] See *Annual Digest*, 1947, Case No. 57.]

[4] See 8 U. S. C. § 210. Of course, neither a reentry permit, issuable upon proof of prior lawful admission to the United States, § 210 (b), nor an immigration visa entitles an otherwise inadmissible alien to entry. §§ 210 (f), 202 (g). An immigrant is not unaware of this; § 202 (g) directs those facts to be " printed conspicuously upon every immigration visa." For a recent study of entry procedures with recommendations, see Report of the President's Commission on Immigration and Naturalization (1953), cc. 10–11.

[5] 8 U. S. C. § 707; *United States* v. *Larsen*, 165 F. 2d 433 (C.A. 2d Cir. 1947).

promulgated pursuant to the Passport Act. Nor need he disclose the evidence upon which that determination rests. *Knauff* v. *Shaughnessy*, 338 U. S. 537 (1950).[1]

" There remains the issue of respondent's continued exclusion on Ellis Island. Aliens seeking entry from contiguous lands obviously can be turned back at the border without more. *Polymeris* v. *Trudell*, 284 U. S. 279 (1932).[2] While the Government might keep entrants by sea aboard the vessel pending determination of their admissibility, resulting hardships to the alien and inconvenience to the carrier persuaded Congress to adopt a more generous course. By statute it authorized, in cases such as this, aliens' temporary removal from ship to shore.[3] But such temporary harborage, an act of legislative grace, bestows no additional rights. Congress meticulously specified that such shelter ashore ' shall not be considered a landing ' nor relieve the vessel of the duty to transport back the alien if ultimately excluded.[4] And this Court has long considered such temporary arrangements as not affecting an alien's status; he is treated as if stopped at the border. *Ekiu* v. *United States*, 142 U. S. 651, 661–662 (1892); *United States* v. *Ju Toy*, 198 U. S. 253, 263 (1905); *Kaplan* v. *Tod*, 267 U. S. 228, 230 (1925).

" Thus we do not think that respondent's continued exclusion deprives him of any statutory or constitutional right. It is true that resident aliens temporarily detained pending expeditious consummation of deportation proceedings may be released on bond by the Attorney General whose discretion is subject to judicial review. *Carlson* v. *Landon*, 342 U. S. 524 (1952). By that procedure aliens uprooted from our midst may rejoin the community until the Government effects their leave.[5] An exclusion proceeding grounded on danger to the national security, however, presents different considerations; neither the rationale nor the statutory authority for such release exists.[6] Ordinarily to admit an alien barred from entry on security grounds nullifies the very purpose of the exclusion proceedings; Congress in 1950 declined to include such authority in the statute.[7] That exclusion by the United States plus other nations' inhospitality results in present hardship cannot be ignored.

[[1] See *Annual Digest*, 1949, Case No. 74.]

[[2] See *Annual Digest*, 1931–1932, Case No. 138.]

[3] 8 U. S. C. § 151.

[4] 8 U. S. C. §§ 151, 154.

[5] 8 U. S. C. (Supp. V) § 156. We there noted that " the problem of habeas corpus after unusual delay in *deportation hearings* is not involved in this case." 342 U. S., at 546. (Emphasis added.)

[6] 8 U. S. C. § 154 permits temporary suspension of deportation of excluded aliens whose testimony is needed on behalf of the United States. Manifestly respondent does not fall within that class. While the essence of that provision is retained in § 237 (d) of the Immigration and Nationality Act of 1952, 66 Stat. 202, § 212 (d) (5) of that Act, 66 Stat. 188, vests new and broader discretion in the Attorney General. Cf. 8 U. S. C. §§ 136 (p) (q); 8 U. S. C. (Supp. V) § 137–5 (a) (b). Those provisions are not now here.

[7] See S. Rep. No. 1515, 81st Cong., 2d Sess. 643–644.

But, the times being what they are, Congress may well have felt that other countries ought not shift the onus to us; that an alien in respondent's position is no more ours than theirs. Whatever our individual estimate of that policy and the fears on which it rests, respondent's right to enter the United States depends on the congressional will, and courts cannot substitute their judgment for the legislative mandate. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 590–591 (1952)."

Black J., with whom Douglas J. concurred, stated in a dissenting opinion:

> " Mr. Justice Jackson forcefully points out the danger in the Court's holding that Mezei's liberty is completely at the mercy of the unreviewable discretion of the Attorney General. I join Mr. Justice Jackson in the belief that Mezei's continued imprisonment without a hearing violates due process of law.
>
> " No society is free where government makes one person's liberty depend upon the arbitrary will of another. Dictatorships have done this since time immemorial. They do now. Russian laws of 1934 authorized the People's Commissariat to imprison, banish and exile Russian citizens as well as ' foreign subjects who are socially dangerous.'* Hitler's secret police were given like powers. German courts were forbidden to make any inquiry whatever as to the information on which the police acted. Our Bill of Rights was written to prevent such oppressive practices. Under it this Nation has fostered and protected individual freedom. The Founders abhorred arbitrary one-man imprisonments. Their belief was—our constitutional principles are—that no person of any faith, rich or poor, high or low, native or foreigner, white or colored, can have his life, liberty or property taken ' without due process of law.' This means to me that neither the federal police nor federal prosecutors nor any other governmental official, whatever his title, can put or keep people in prison without accountability to courts of justice. It means that individual liberty is too highly prized in this country to allow executive officials to imprison and hold people on the basis of information kept secret from courts. It means that Mezei should not be deprived of his liberty indefinitely except as the result of a fair open court hearing in which evidence is appraised by the court, not by the prosecutor."

Jackson J., with whom Frankfurter J. concurred, dissented on the ground that the confinement of Mezei was in the circumstances no longer ancillary to exclusion, and that the petitioner was being deprived of his liberty without due process of law. After stating the facts of the case, he said:

> " Fortunately it still is startling, in this country, to find a person held indefinitely in executive custody without accusation of crime or judicial trial. Executive imprisonment has been considered oppressive and lawless since John, at Runnymede, pledged that no free man

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* Decree of the Central Executive Committee and Council of People's Commissars, U. S. S. R., 5 Nov. 1934; Collection of Laws, U. S. S. R., 1935, No. 11, Art. 84. Hazard, Materials on Soviet Law (1947), 16. See Hazard, Reforming Soviet Criminal Law, 29 J. Crim. L. & Criminology 157, 168–169 (1938–1939). See also Berman, Principles of Soviet Criminal Law, 56 Yale L. J. 803(1946).

should be imprisoned, dispossessed, outlawed, or exiled save by the judgment of his peers or by the law of the land. The judges of England developed the writ of habeas corpus largely to preserve these immunities from executive restraint. Under the best tradition of Anglo-American law, courts will not deny hearing to an unconvicted prisoner just because he is an alien whose keep, in legal theory, is just outside our gates. Lord Mansfield, in the celebrated case holding that slavery was unknown to the common law of England, ran his writ of habeas corpus in favor of an alien, an African Negro slave, and against the master of a ship at anchor in the Thames.[1]

I.

"What is our case?[2] In contemplation of law, I agree, it is that of an alien who asks admission to the country. Concretely, however, it is that of a lawful and law-abiding inhabitant of our country for a quarter of a century, long ago admitted for permanent residence, who seeks to return home. After a foreign visit to his aged and ailing mother that was prolonged by disturbed conditions of Eastern Europe, he obtained a visa for admission issued by our consul and returned to New York. There the Attorney General refused to honor his documents and turned him back as a menace to this Nation's security. This man, who seems to have led a life of unrelieved insignificance, must have been astonished to find himself suddenly putting the Government of the United States in such fear that it was afraid to tell him why it was afraid of him. He was shipped and reshipped to France, which twice refused him landing. Great Britain declined, and no other European country has been found willing to open its doors to him. Twelve countries of the American Hemisphere refused his applications. Since we proclaimed him a Samson who might pull down the pillars of our temple, we should not be surprised if peoples less prosperous, less strongly established and less stable feared to take him off our timorous hands. With something of a record as an unwanted man, neither his efforts nor those of the United States Government any longer promise to find him an abiding place. For nearly two years he was held in custody of the immigration authorities of the United States at Ellis Island, and if the Government has its way he seems likely to be detained indefinitely, perhaps for life, for a cause known only to the Attorney General.

"Is respondent deprived of liberty? The Government answers that he was 'transferred to Ellis Island on August 1, 1950, for safekeeping,' and 'is not being detained in the usual sense but is in custody solely to prevent him from gaining entry to the United States in violation of law. He is free to depart from the United States to any country of his own choice.' Government counsel ingeniously argued that Ellis Island is his 'refuge' whence he is free to take leave in any direction except west. That might mean freedom, if only he were an amphibian! Realistically, this man is incarcerated by a combination of forces which keep him as effectually as a prison, the dominant and proximate of these forces being the United States immigration authority. It overworks legal fiction to say that one is free in law when by the commonest of common sense he is bound. Despite the impeccable legal logic of the Government's argument on this point, it leads to an artificial and unreal conclusion.[1] We must regard this alien as deprived of liberty, and the question is whether the deprivation is a denial of due process of law.

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[1] *Sommersett's Case*, 20 How. St. Tr. 1; 2 Campbell, Lives of The Chief Justices, 418; Fiddes, Lord Mansfield and The Sommersett Case, 50 L. Q. Rev. 499.

[2] I recite facts alleged in the petition for the writ. Since the Government declined to try the case on the merits, I think we must consider the question on well-pleaded allegations of the petition. Petitioner might fail to make good on a hearing; the question is, must he fail without one?

"The Government on this point argues that 'no alien has any constitutional right to entry into the United States'; that 'the alien has only such rights as Congress sees fit to grant in exclusion proceedings'; that 'the so-called detention is still merely a continuation of the exclusion which is specifically authorized by Congress'; that since 'the restraint is not incidental to an order [of exclusion] but is, itself, the effectuation of the exclusion order, there is no limit to its continuance' other than statutory, which means no limit at all. The Government all but adopts the words of one of the officials responsible for the administration of this Act who testified before a congressional committee as to an alien applicant, that 'He has no rights.'[2]

"The interpretations of the Fifth Amendment's command that no person shall be deprived of life, liberty or property without due process of law, come about to this: reasonable general legislation reasonably applied to the individual. The question is whether the Government's detention of respondent is compatible with these tests of substance and procedure.

II. Substantive Due Process.

"Substantively, due process of law renders what is due to a strong state as well as to a free individual. It tolerates all reasonable measures to insure the national safety, and it leaves a large, at times a potentially dangerous, latitude for executive judgment as to policies and means.[1]

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[1] Mr. Justice Holmes, for the Court, said in *Chin Yow* v. *United States*, 208 U. S. 8, 12–13:

"If we regard the petitioner, as in *Ju Toy's case* it was said that he should be regarded, as if he had been stopped and kept at the limit of our jurisdiction, 198 U. S. 263, still it would be difficult to say that he was not imprisoned, theoretically as well as practically, when to turn him back meant that he must get into a vessel against his wish and be carried to China. The case would not be that of a person simply prevented from going in one direction that he desired and had a right to take, all others being left open to him, a case in which the judges were not unanimous in *Bird* v. *Jones*, 7 Q. B. 742. But we need not speculate upon niceties. It is true that the petitioner gains no additional right to entrance by being allowed to pass the frontier in custody for the determination of his case. But on the question whether he is wrongly imprisoned we must look at the actual facts. *De facto* he is locked up until carried out of the country against his will."

[2] Testimony of Almanza Tripp, an immigration service official, before the Senate Subcommittee on Immigration on February 15, 1950, included the following:

"Now, when we have a case of that sort, where central registry contains something derogatory of that nature, I do not believe we should make a finding of admissibility until it has been disproved. But the evidence that they had in central registry would not be sufficient for our Service to exclude by the normal board of special-inquiry proceedings, because those proceedings must be conducted in a manner in which they could not be subject to attack in a court of the United States.

"You may say that it is unfair to the applicant not to give him that protection, but you must remember that the applicant is an applicant. He has no rights . . ." (Hearings before the Subcommittee on Amendments to the Displaced Persons Act, Senate Committee on the Judiciary, 81st Cong., 1st and 2d Sessions 665.)

" After all, the pillars which support our liberties are the three branches of government, and the burden could not be carried by our own power alone. Substantive due process will always pay a high degree of deference to congressional and executive judgment, especially when they concur, as to what is reasonable policy under conditions of particular times and circumstances. Close to the maximum of respect is due from the judiciary to the political departments in policies affecting security and alien exclusion. *Harisiades* v. *Shaughnessy*, 342 U. S. 580.

" Due process does not invest any alien with a right to enter the United States, nor confer on those admitted the right to remain against the national will. Nothing in the Constitution requires admission or sufferance of aliens hostile to our scheme of government.

" Nor do I doubt that due process of law will tolerate some impounding of an alien where it is deemed essential to the safety of the state. Even the resident, friendly alien may be subject to executive detention without bail, for a reasonable period, pending consummation of deportation arrangements. *Carlson* v. *Landon*, 342 U. S. 524. The alien enemy may be confined or his property seized and administered because hostility is assumed from his continued allegiance to a hostile state. Cf. *Ludecke* v. *Watkins*, 335 U. S. 160;[2] *Zittman* v. *McGrath*, 341 U. S. 446, and 341 U. S. 471.

" If due process will permit confinement of resident aliens friendly in fact because of imputed hostility, I should suppose one personally at war with our institutions might be confined, even though his state is not at war with us. In both cases, the underlying consideration is the power of our system of government to defend itself, and changing strategy of attack by infiltration may be met with changed tactics of defense.

" Nor do I think the concept of due process so paralyzing that it forbids all detention of an alien as a preventive measure against threatened dangers and makes confinement lawful only after the injuries have been suffered. In some circumstances, even the citizen in default of bail has long been subject to federal imprisonment for security of the peace and good behavior.[3] While it is usually applied for express verbal threats, no reason is known to me why the power is not the same in the case of threats inferred by proper procedures from circumstances. The British, with whom due process is a habit, if not a written constitutional dictum, permit a court in a limited class of cases to pass a ' sentence of preventive detention ' if satisfied that it is expedient for the protection of the public.[4]

" I conclude that detention of an alien would not be inconsistent with substantive due process, provided—and this is where my dissent begins—he is accorded procedural due process of law.

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[1] Cf. *Korematsu* v. *United States*, 323 U. S. 214.

[[2] See *Annual Digest*, 1949, Case No. 74.]

[3] 18 U. S. C. §3043 ; cf. Criminal Code of New York, 66 McKinney's Consolidated Laws, Tit. II, c. II, § 84.

[4] Criminal Justice Act, 1948, § 21 (2).

III. PROCEDURAL DUE PROCESS.

" Procedural fairness, if not all that originally was meant by due process of law, is at least what it most uncompromisingly requires. Procedural due process is more elemental and less flexible than substantive due process. It yields less to the times, varies less with conditions, and defers much less to legislative judgment. Insofar as it is technical law, it must be a specialized responsibility within the competence of the judiciary on which they do not bend before political branches of the Government, as they should on matters of policy which comprise substantive law.

" If it be conceded that in some way this alien could be confined, does it matter what the procedure is ? Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied. Indeed, if put to the choice, one might well prefer to live under Soviet substantive law applied in good faith by our common-law procedures than under our substantive law enforced by Soviet procedural practices. Let it not be overlooked that due process of law is not for the sole benefit of an accused. It is the best insurance for the Government itself against those blunders which leave lasting stains on a system of justice but which are bound to occur on *ex parte* consideration. Cf. *Knauff* v. *Shaughnessy*, 338 U. S. 537,[1] which was a near miss, saved by further administrative and congressional hearings from perpetrating an injustice. See Knauff, *The Ellen Knauff Story* (New York 1952).

" Our law may, and rightly does, place more restrictions on the alien than on the citizen. But basic fairness in hearing procedures does not vary with the status of the accused. If the procedures used to judge this alien are fair and just, no good reason can be given why they should not be extended to simplify the condemnation of citizens. If they would be unfair to citizens, we cannot defend the fairness of them when applied to the more helpless and handicapped alien. This is at the root of our holdings that the resident alien must be given a fair hearing to test an official claim that he is one of a deportable class. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33.[2]

" The most scrupulous observance of due process, including the right to know a charge, to be confronted with the accuser, to cross-examine informers and to produce evidence in one's behalf, is especially necessary where the occasion of detention is fear of future misconduct, rather than crimes committed. Both the old proceeding by which one may be bound to keep the peace and the newer British ' preventive detention ' are safeguarded with full rights to judicial hearings for the accused. On the contrary, the Nazi régime in Germany installed a system of ' protective custody ' by which the arrested could claim no judicial or other hearing process,[3] and as a result the concentration camps were populated with victims of summary executive

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[1] *Annual Digest*, 1949, Case No. 74.]

[2] *International Law Reports*, 1950, Case No. 76.]

[3] Herman *Göring*, on cross-examination, made the following statements:

" . . . [T]hose who had committed some act of treason against the new state, or those who might be proved to have committed such an act, were naturally turned detention for secret reasons. That is what renders Communist justice such a travesty. There are other differences, to be sure, between authoritarian procedure and common law, but differences in the process of administration make all the difference between a reign of terror and one of law. Quite unconsciously, I am sure, the Government's theory of custody for 'safekeeping' without disclosure to the victim of charges, evidence, informers or reasons, even in an administrative proceeding, has unmistakable overtones of the 'protective custody' of the Nazis more than of any detaining procedure known to the common law. Such a practice, once established with the best of intentions, will drift into oppression of the disadvantaged in this country as surely as it has elsewhere. That these apprehensive surmises are not 'such stuff as dreams are made on' appears from testimony of a top immigration official concerning an applicant that 'He has no rights.'

" Because the respondent has no right of entry, does it follow that he has no rights at all ? Does the power to exclude mean that exclusion may be continued or effectuated by any means which happen to seem appropriate to the authorities ? It would effectuate his exclusion to eject him bodily into the sea or to set him adrift in a rowboat. Would not such measures be condemned judicially as a deprivation of life without due process of law ? Suppose the authorities decide to disable an alien from entry by confiscating his valuables and money. Would we not hold this a taking of property without due process of law ? Here we have a case that lies between the taking of life and the taking of property; it is the taking of liberty. It seems to me that this, occurring within the United States or its territorial waters, may be done only by proceedings which meet the test of due process of law.

" Exclusion of an alien without judicial hearing, of course, does not deny due process when it can be accomplished merely by turning him back on land or returning him by sea. But when indefinite confinement becomes the means of enforcing exclusion, it seems to me that due process requires that the alien be informed of its grounds and have a fair chance to overcome them. This is the more due him when he is entrapped into leaving the other shore by reliance on a visa which the Attorney General refuses to honor.

" It is evident that confinement of respondent no longer can be justified as a step in the process of turning him back to the country whence he came. Confinement is no longer ancillary to exclusion; it can now be justified only as the alternative to normal exclusion. It is an end in itself.

" The Communist conspiratorial technique of infiltration poses a

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over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody, and these were the people who were taken to concentration camps . . . Likewise, if for political reasons . . . someone was taken into protective custody, that is, purely for reasons of state, this could not be reviewed or stopped by any court." He claimed (though the claim seemed specious) that twenty-four hours after being put in concentration camps they were informed of the reasons and after forty-eight hours were allowed an attorney. " But this by no means rescinded my order that a review was not permitted by the courts of a politically necessary measure of protective custody. These people were simply to be given an opportunity of making a protest." 9 International Military Tribunal Proceedings 420-421 (March 18, 1946) [*Annual Digest*, 1946, Case No. 92].

problem which sorely tempts the Government to resort to confinement of suspects on secret information secretly judged. I have not been one to discount the Communist evil. But my apprehensions about the security of our form of government are about equally aroused by those who refuse to recognize the dangers of Communism and those who will not see danger in anything else.

" Congress has ample power to determine whom we will admit to our shores and by what means it will effectuate its exclusion policy. The only limitation is that it may not do so by authorizing United States officers to take without due process of law the life, the liberty or the property of an alien who has come within our jurisdiction; and that means he must meet a fair hearing with fair notice of the charges.[1]

" It is inconceivable to me that this measure of simple justice and fair dealing would menace the security of this country. No one can make me believe that we are that far gone."

[Reports: 345 U. S. 206 ; 97 L. Ed. 956 ; 73 Sup. Ct. 625.]

NOTE.—The above case is noted in *Boston University Law Review*, 34 (1954), p. 85; *Columbia Law Review*, 52 (1953), p. 1060; *George Washington Law Review*, 21 (1952), p. 106; *Harvard Law Review*, 67 (1953), p. 99; *Michigan Law Review*, 51 (1953), p. 1231; *Nebraska Law Review*, 33 (1953), p. 94; *New York University Law Review*, 28 (1953), p. 1042; *Ohio State Law Journal*, 15 (1954), p. 78; *Rocky Mountain Law Review*, 26 (1954), p. 192; *Southern California Law Review*, 27 (1954), p. 315; *University of Pennsylvania Law Review*, 101 (1952), p. 413; and *Vanderbilt Law Review*, 6 (1952), p. 118.

Aliens—Admission of—What Constitutes " an Entry "—Arrival of a Filipino in the United States before Independence of the Philippines—Not an Entry for Purpose of Deportation for Commission of Crime—The Philippines as a " Foreign Country "—The Law of the United States of America.

BARBER *v.* GONZALES.

United States, Court of Appeals, Ninth Circuit. September 15, 1953.

Supreme Court. June 7, 1954.

(Warren C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.).

THE FACTS.—Gonzales was born in the Philippine Islands in 1913 and came to the continental United States in 1930. He thereafter resided in the United States. In 1941 and 1950, he was convicted of the crimes of assault with a deadly weapon and of burglary, and was sentenced to imprisonment for one and two years respectively. In 1951, after an administrative hearing, he was ordered to be deported to the Philippine Islands under Section 19 (a) of the Immigration Act of 1917, 39 United States Statutes at Large 889, as amended, as an alien who "after entry" had been sentenced more than once to imprisonment for terms of one year or more for crimes involving moral turpitude.

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[1] The trial court sought to reconcile due process for the individual with claims of security by suggesting that the Attorney General disclose *in camera* enough to enable a judicial determination of the legality of the confinement. The Attorney General refused. I do not know just how an *in camera* proceeding would be handled in this kind of case. If respondent, with or without counsel, were present, disclosures to them might well result in disclosures by them. If they are not allowed to be present, it is hard to see how it would answer the purpose of testing the Government's case by cross-examination or counter-evidence, which is what a hearing is for. The questions raised by the proposal need not be discussed since they do not call for decision here.

After Gonzales was taken into custody, he filed a petition for a writ of habeas corpus in a United States District Court. The petition attacked the validity of the deportation order on the ground, among others, that he was not subject to deportation under Section 19 (a) since he had not made an "entry" within the meaning of that section. The District Court dismissed the petition.

On appeal,

Held (by the Court of Appeals): that the judgment of the District Court must be reversed. At the time Gonzales arrived in the continental United States, he was not an alien but a national of the United States coming from an outlying possession. This arrival did not constitute an "entry" within the meaning of the Immigration Act, and he was hence not subject to deportation thereunder. [Report: 207 F.2d 398.]

The District Director of the Immigration and Naturalization Service petitioned for *certiorari* and the writ was granted (346 U.S. 914, 98 L.Ed. 410, 74 Sup. Ct. 274).

Held (by the Supreme Court): that the judgment of the Court of Appeals must be affirmed. An "entry" for the purposes of the Immigration Act may only be made from a foreign port or place. Gonzales was a United States national moving from an insular possession to the mainland. Not until the Philippine Independence Act of 1934 could the Philippines be regarded as "foreign" for immigration purposes. Having made no "entry", Gonzales was not deportable.

The Court said (*per* Warren C.J.): "The sole question presented is whether respondent—who was born a national of the United States in the Philippine Islands, who came to the continental United States as a national prior to the Philippine Independence Act of 1934, and who was sentenced to imprisonment in 1941 and 1950 for crimes involving moral turpitude—may now be deported under § 19 (a) of the Immigration Act of 1917.

"It was conceded that respondent was born a national of the United States; that as such he owed permanent allegiance to the United States, including the obligation of military service; that he retained this status when he came to the continental United States in 1930 and hence was not then subject to the Immigration Act of

1917 or any other federal statute relating to the exclusion or deportation of aliens.[1] The Government, however, contends that respondent's status as a national was changed by the Philippine Independence Act of 1934, 48 Stat. 456, which provided for the eventual independence of the Philippines, subsequently achieved in 1946, 60 Stat. 1352. Section 8 (a) (1) of the 1934 Act provides:

> 'For the purposes of the Immigration Act of 1917, . . . this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of fifty.'

The Government urges that the reference in § 8 (a) (1) to 'citizens of the Philippine Islands' includes Filipinos then residing in the United States; that by virtue of this provision the respondent was assimilated to the status of an alien for purposes of 'immigration, exclusion or expulsion'; and that, having been twice convicted thereafter of crimes involving moral turpitude, he is deportable under § 19 (a) of the Immigration Act of 1917.

"The Government's argument is premised on the assumption that respondent made an 'entry' within the meaning of § 19 (a). If he did not make such an 'entry', then he is not deportable under that section, even assuming that the Government is correct in its broad construction of the 1934 Philippine Independence Act. Section 19 (a) provides:

> '. . . except as hereinafter provided, any alien who is hereafter sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitide, *committed at any time after entry* . . . shall, upon the warrant of the Attorney General, be taken into custody and deported . . . .' (Italics added.)

The Court of Appeals sustained respondent's contention that he had never made the requisite 'entry.' With this conclusion, we agree.

"The Government would have us interpret 'entry' in § 19 (a) in its 'ordinary, everyday sense' of a 'coming into the United

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[1] From the Spanish cession in 1898 until final independence in 1946, the Philippine Islands were American territory subject to the jurisdiction of the United States. See *Hooven & Allison Co.* v. *Evatt*, 324 U. S. 652, 674–676. Persons born in the Philippines during this period were American nationals entitled to the protection of the United States and conversely owing permanent allegiance to the United States. They could not be excluded from this country under a general statute relating to the exclusion of "aliens." See *Gonzales* v. *Williams*, 192 U. S. 1, 12–13; *Toyota* v. *United States*, 268 U. S. 402, 411. But, until 1946, neither could they become United States citizens. See *Toyota* v. *United States, supra*; 60 Stat. 416.

States'. Under this view, respondent's 'coming into the United States' from the Philippine Islands in 1930 would satisfy the 'entry' requirement. While it is true that statutory language should be interpreted whenever possible according to common usage, some terms acquire a special technical meaning by a process of judicial construction. So it is with the word 'entry' in § 19 (a). *E.g.*, *Delgadillo* v. *Carmichael*, 332 U. S 388;[1] *United States ex rel. Claussen* v. *Day*, 279 U. S. 398; *Di Pasquale* v. *Karnuth*, 158 F.2d. 878; *Del Guercio* v. *Gabot*, 161 F.2d 559.[2] Cf. *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425.[3] In *United States ex rel. Claussen* v. *Day*, *supra*, at 401, this Court stated the applicable rule:

> 'The word "entry" [in § 19 (a)] by its own force implies a coming from outside. The context shows that in order that there be an entry within the meaning of the Act *there must be an arrival from some foreign port or place.* There is no such entry where one goes to sea on board an American vessel from a port of the United States and returns to the same or another port of this country without having been in any foreign port or place.' (Italics added.)

See also *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129, 132; *Carmichael* v. *Delaney*, 170 F.2d 239, 242–243.[4] This concept of 'entry' was codified by Congress in the Immigration and Nationality Act of 1952.[5]

" At the time respondent came to the continental United States, he was not arriving 'from some foreign port or place.' On the contrary, he was a United States national moving from one of our insular possessions to the mainland. It was not until the 1934

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[1] [See *Annual Digest*, 1947, Case No. 57.]

[[2] *Ibid.*, Case No. 9.]

[3] In the *Volpe* case, the Court stated:

" We accept the view that *the word 'entry'* . . . [in § 19 (a)] . . . *includes any coming of an alien from a foreign country into the United States* whether such coming be the first or any subsequent one. And this requires affirmance of the challenged judgment. . . . That the second *coming of an alien from a foreign country into the United States* is an entry within the usual acceptance of that word is clear enough from *Lewis* v. *Frick*, 233 U. S. 291; *Claussen* v. *Day*, 279 U. S. 398. An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word 'entry' in § 19 should have its ordinary meaning." (Italics added.)

The context of the latter sentence makes it clear that the Court regarded the words "ordinary meaning" as being "any coming of an alien from a foreign country." In the *Delgadillo* case, *supra*, the Court narrowed this definition even further by holding that a resident alien does not make an "entry" from a foreign country if his arrival in the foreign country was unintentional.

[[4] See *Annual Digest*, 1948, Case No. 82.]

[5] Section 101 (a) (13) of the 1952 Act, 66 Stat. 167, 8 U. S. C. § 1101 (a) (13), provides in pertinent part:

" The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession. . . ."

Section 101 (a) (29), 66 Stat. 170, 8 U. S. C. § 1101 (a) (29), defines "outlying possessions" as American Samoa and Swains Island. By a special provision in the 1952 Act, the exclusion process is made applicable to any alien coming to the continental United States from Hawaii, Alaska, Guam, Puerto Rico, or the Virgin Islands. 66 Stat. 188, 8 U. S. C. § 1182 (d) (7).

Philippine Independence Act that the Philippines could be regarded as ' foreign ' for immigration purposes. Having made no ' entry ', respondent is not deportable under § 19 (a) as an alien who 'after entry ' committed crimes involving moral turpitude. The Government warns that this conclusion is inconsistent with a broad congressional purpose to terminate the United States residence of alien criminals. But we believe a different conclusion would not be permissible in view of the well-settled meaning of ' entry ' in § 19 (a). Although not penal in character, deportation statutes as a practical matter may inflict ' the equivalent of banishment or exile,' *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10, and should be strictly construed. See *Delgadillo* v. *Carmichael*, 332 U. S. 388, 391. In the absence of explicit language showing a contrary congressional intent, we must give technical words in deportation statutes their usual technical meaning.[1]"

Minton J., with whom Reed and Burton JJ. joined, dissented on the ground that the term " entry " should not be given a strict construction which would have the effect of protecting alien criminals. He said:

" But for this Court's holding that § 19 (a) of the Immigration Act of 1917 must be construed strictly and the word ' entry ' given a special meaning, I would be content with the excellent dissent of Judge Bone in the court below. 207 F. 2d 398, 402.

" The effect of the Court's opinion is to construe the Act strictly in favor of the convicted criminal sought to be deported for his criminal acts, rather than in favor of the United States in protection of its citizens. I know of no good reason why we should by strained construction of an Act compel the United States to cling onto alien criminals. It is not the public policy of this country to construe its statutes strictly in favor of alien criminals whose convictions have already been established of record. Why should we give a strained construction to the word ' entry ' in the instant case ? The least we should do is to give the word ' entry ' its ordinary meaning.

" In construing this very statute, this Court said in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, 425:

> ' An examination of the Immigration Act of 1917, we think, reveals nothing sufficient to indicate that Congress did not intend the word " entry " in § 19 should have its ordinary meaning.'

Cf. *Eichenlaub* v. *Shaughnessy*, 338 U. S. 521.[2]

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[1] The respondent also attacks the validity of the deportation order on the grounds: (1) that he made no " entry " because he was not an alien when he came to this country; (2) that § 8 (a) (1) of the 1934 Philippine Independence Act did not apply to Filipinos already residing here and that hence he was not an alien in 1941 when he was sentenced for one of the two crimes involved in this procedure; (3) that he is not an alien today because Congress lacked the power to deprive him of his status as a national. Our disposition of the case makes it unnecessary to consider these contentions.

[[2] See *International Law Reports*, 1950, Case No. 56.]

"The case of *Delgadillo* v. *Carmichael*, 332 U. S. 388, lends no authority to this case. In that case, the alien had never voluntarily left the United States for foreign land. His ship was torpedoed. He was blown into the sea. He was rescued and taken to Cuba, from whence he came back to the United States by way of Miami, Florida. This Court said:

> 'In this case petitioner, of course, chose to return to this country, knowing he was in a foreign place. But the exigencies of war, not his voluntary act, put him on foreign soil. It would indeed be harsh to read the statute so as to add the peril of deportation to such perils of the sea. We might as well hold that if he had been kipnapped and taken to Cuba, he made a statutory "entry" on his voluntary return. Respect for law does not thrive on captious interpretations.' P. 391.

"There is nothing captious or fortuitous about this petitioner's 'entry' into the United States. He came to this country from outside, as all aliens do. No case by this Court supports the special construction given by the Court to the word 'entry.'

"Because of the Court's strict construction of this statute, which has the effect of putting a liberal construction on the statute in favor of the alien criminal, which I believe to be contrary to the public policy of this country, I dissent."

[Reports: 347 U. S. 637, 98 L.Ed. 1009, 74 Sup.Ct. 822.]

Aliens—Admission of—Resident Alien Distinguished from Entering Alien—Rights of Resident Alien under United States Constitution—Effect of Foreign Voyage on Status of Resident Seaman—The Law of the United States of America.

ROGGENBIHL *v.* LUSBY *ET AL.* (*THE MALDEN*).

United States, District Court, District of Massachusetts.
November 13, 1953.

THE FACTS.—Roggenbihl, a national of Norway, entered the United States in 1920. During the ensuing years he followed his occupation as a seaman on United States vessels and for many years maintained a home in or near Boston. Beginning in May 1953, he was kept aboard the *Malden*, on which he was serving as a seaman, or ashore in the custody of the Immigration Service, without notice of the ground on which he was refused permission to re-enter the United States. He thereupon petitioned for a writ of habeas corpus and contended that he was being detained unlawfully at the direction of the Immigration Service in violation of his right under the United States Constitution not to be deprived of his liberty without due process of law. The Immigration Service maintained that Roggenbihl had never been lawfully admitted to the United States and that he was therefore an entrant alien not entitled to the protection of the Constitution.

Held: that the writ must be sustained and the petitioner discharged from custody. Even though Roggenbihl had never been a lawful permanent resident of the United States, he was not in the position of an initially entering alien, who has no rights under the United States Constitution. He was accordingly entitled to notice of the charges against him and to a hearing before he could be deported.

The Court said: ". . . it must be found that Roggenbihl has never been legally admitted to the United States as a permanent resident.

" The important issue in the case is whether one in the status of petitioner here is a person entitled to the protection of the Fifth Amendment. If he is, then the refusal to give him a landing permit and the consequent enforced detention of petitioner aboard his ship while it remains in an American port, all done without notice to petitioner of the charges against him or without opportunity to be heard, clearly constitutes a deprivation of liberty without due process of law. Respondent Nicolls, however, contends that since Roggenbihl has never lawfully been admitted to this country for permanent residence, his status is merely that of an alien on the threshold of initial entry, who cannot claim a constitutional right to notice and hearing and whose exclusion by administrative action is final and conclusive. *Shaughnessy* v. *U. S. ex rel. Mezei*, 345 U.S. 206, 73 S.Ct. 625;[1] *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 70 S.Ct. 309, 94 L.Ed. 317.[2]

" Petitioner relies on the case of *Kwong Hai Chew* v. *Colding*, 344 U.S. 590, 73 S.Ct. 472. In that case Chew, like petitioner here, had made a voyage to a foreign port as a seaman on a vessel of American registry, and was, on his return to an American port, denied permission to land. The Supreme Court held that the status of Chew was to be assimilated to that of a lawfully resident alien, physically present in the United States, entitled to notice of the charges against him and opportunity for a hearing. The only significant difference between this case and the Chew case is that Chew had been lawfully admitted to the United States as a permanent resident prior to the voyage, while Roggenbihl's presence here as a permanent resident has never been lawful.

" The gist of the Supreme Court's holding in the Chew case was that a foreign voyage by a seaman on a vessel of American registry with a home port in the United States does not terminate the constitutional status which he enjoyed prior to the voyage. Applying that principle to the present case, Roggenbihl while on board his ship on its return to an American port, is to be regarded, at least for constitutional purposes, not as an entrant alien, but as an alien physically, although unlawfully, resident in the United States. The voyage is not to be regarded as an interruption of his continuous physical presence here since 1920.

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[1] [See *supra*, p. 264.]

[2] [See *Annual Digest*, 1949, Case No. 74.]

" Roggenbihl, before signing on as a seaman on the *Malden*, was a person within the protection of the Fifth Amendment and entitled to due process of law. An alien who has not entered the country clandestinely and who has remained in the country for some time and has become subject to its jurisdiction and a part of its population cannot be taken into custody and deported without notice or hearing even though it is alleged that his presence here is illegal. *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 49–50, 70 S.Ct. 445, 94 L.Ed. 616;[1] *The Japanese Immigrant Case, Yamataya* v. *Fisher*, 189 U.S. 86, 100, 101, 23 S.Ct. 611, 47 L.Ed. 721. On the principles of the *Chew* case, petitioner's status has not been changed and his constitutional rights have not been lost by his voyages to foreign ports as a seaman on the *Malden*.

" In the *Chew* case, 344 U.S. at pages 600, 601, 73 S.Ct. 472, the Supreme Court pointed out, in support of its views, § 307 (d) (2) of the Nationality Act of 1940, 8 U.S.C.A. § 707 (d) (2), providing that continuous service by a seaman on a vessel of American registry with a home port in the United States should be considered as residence in the United States for naturalization purposes. Similar provisions are contained in § 330 of the Immigration and Nationality Act of 1952, 8 U.S.C.A. § 1441. Moreover, paragraph (2) of that section allows seamen to claim certain service on American vessels prior to September 27, 1950 as residence and physical presence in the United States and provides that if their petition is filed within one year of the effectual date of the Act they may be naturalized without being required to establish a lawful admission for permanent residence. The privilege conferred by § 1441 (2) is specifically for the benefit of seamen in petitioner's position who cannot establish legal residence here. It cannot be held that such a seaman by the mere fact of embarking on a foreign voyage places himself in a position where his right to land in this country and claim the privilege granted him is subject to be defeated by an exclusionary procedure which lacks the basic elements of due process. It would seem clearly contradictory to the plan and purpose of the Act to hold that a seaman with petitioner's long record of actual residence here and service on American vessels both before and after 1950, has no better constitutional status than an alien approaching our shores for the first time.

" No contention is made here that petitioner's exclusion has been based on security grounds or that his release would create any danger to our national safety. It appears that in fact the Immigration Service believes he should be excluded as a person who has twice been convicted of crimes involving moral turpitude. If these charges are true, there are constitutionally acceptable procedures by which they can be established and petitioner deported. The court here is concerned solely with the question of the lawfulness of petitioner's present detention. It must be found that this detention, without the notice and hearing to which he is entitled as a matter of due process under the Fifth Amendment, is unlawful and petitioner is entitled to be released."

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[1] See *International Law Reports*, 1950, Case No. 76.]

[Report: 116 F. Supp. 315.]

NOTE.—The exclusion of entrant aliens, as distinguished from the expulsion of resident aliens, was also in issue in *United States ex rel. Bojarchuk* v. *Shaughnessy*, 206 F.2d 238 (2d Cir. 1953) (detention of excludable alien pending deportation held constitutional), and in *United States ex rel. Alvarez y Flores* v. *Savoretti*, 205 F. 2d 544 (5th Cir. 1953) (exclusion upheld where alien admitted commission of crime involving moral turpitude prior to entry).

Aliens—Admission of—Illegitimate Children—The Law of Canada.

Re LEONG BA CHAI.

Canada, Supreme Court of British Columbia. August 13, 1952.
(Clyne J.)

THE FACTS.—Leong Hung Hing was born in China and was a citizen of China until 1951. In 1911 he married Fong Shee, and in 1926, Fong Shee still being alive, he married Ho Shui. A son was subsequently born to Leong Hung Hing and Ho Shui. From 1926 onwards Leong Hung Hing spent long periods in Canada, leaving his family behind in China: however, he sent money back to China for the support of his wives and son. It was Leong Hung Hing's intention eventually to return to China permanently, to enjoy with his family the fruits of his years of toil in Canada. However, by reason of changed conditions in China, he changed his mind, decided to remain in Canada, and became a Canadian citizen in February 1951. In March 1951 Leong Hung Hing applied for the admission to Canada of his son, then aged 18. The Order in Council P.C. 2115, dated September 16, 1930, as amended by Order in Council P.C. 6229 [[1951] S.O.R. 19] dated December 28, 1950, prohibits the landing in Canada of any immigrant of any Asiatic race, subject to the exception that the Immigration Officer-in-Charge may admit any immigrant who otherwise complies with the Immigration Act, R.S.C. 1927, c. 93, if it is shown to his satisfaction that such immigrant is " the wife, the husband, or the umarried child under twenty-one years of age, of any Canadian citizen legally admitted to and resident in Canada, who is in a position to receive and care for his dependents." The Superintendent of Immigration at Vancouver, to whom Leong Hung Hing submitted his application, refused the application on the ground that the son was illegitimate: this decision was upheld, for the same reason, when Leong Hung

Hing appealed to the Minister of Citizenship and Immigration. Leong Hung Hing then applied to the Court in *mandamus* proceedings, seeking an order directing the Immigration Officer-in-Charge in Vancouver to consider the application for the admission of his son.

Held: that *mandamus* should issue as requested. The word "child" in the Order in Council includes both legitimate and illegitimate offspring. Further, the child is legitimate according to the rules of private international law.

The Court said: "In the first place, counsel for the Crown asks me to read the Order in Council as if the word 'legitimate' had been inserted before the word 'child'. I do not think that I am entitled to do so. I cannot assume in the light of present-day circumstances that the Governor-General in Council meant that only legitimate children were to be admitted to Canada and illegitimate children were to be excluded. I do not think that I ought to read into Orders in Council words that are not there. In the case of *Re Hogbin,* [1950] 3 D.L.R. 843, my brother Manson stated at p. 847 that 'the word "child" in its ordinary meaning includes a natural child.' In construing the words of the Order in Council in their ordinary and natural sense, I hold that the word child includes both legitimate and illegitimate offspring."

[Report: [1952] 4 D.L.R. 715.]

Aliens—Admission of—Clandestine Entry—Political Fugitives.

In re DE SAINT-ANTOINE DE FLEURY.

Belgium, Court of Cassation. May 18, 1953.

THE FACTS.—The appellant entered Belgium in 1947 without obtaining a residence permit. In 1952 he was prosecuted for unlawful residence in Belgium, and was convicted in January 1953. He now appealed, on the grounds, first, that the prosecution was time-barred, since failure to obtain a residence permit became an offence within a fortnight from entry into the country, and that three years elapsed since that date before he was prosecuted; and, secondly, that the Court below had not taken into account his plea of coercion (in the circumstances set out below).

Held: that the decision of the Court below must be reversed, and the conviction quashed. The offence was a continuing one, and therefore the prosecution was not time-barred. On the other hand, the plea of coercion should have been examined by the lower Court.

The Court said: "The offence was undoubtedly committed at the expiration of the time-limit laid down in Article 3 of the ministerial order of October 13, 1939. However, it is clear from the relevant enactments that the offence continues to be committed so long as an alien who resides in Belgium without the required authorization fails to ask for and obtain such an authorization. The appellant entered Belgium clandestinely in 1947, and continued to reside there without authorization until the initiation of these proceedings against him.

" Before the Court of Appeal, the appellant invoked a ground of justification consisting, according to him, in the fact of coercion arising out of a sentence of death passed on him by a special court in his own country for acts committed by him which were not crimes under generally accepted principles of law. Failure to take that plea into account constitutes a violation of Article 97 of the Constitution."

[Report: *Pasicrisie belge*, 1953, I, p. 724.]

Aliens—Admission of—Asylum.

See p. 330 (*United States ex rel. Dolenz* v. *Shaughnessy*).

Aliens—Admission of—Due Process of Law—Alien Seaman Lawfully Permanently Resident—Exclusion upon Return from Foreign Voyage—Necessity of a Hearing—Exclusion and Deportation on Basis of Confidential Information—The Law of the United States of America.

See p. 343 (*Kwong Hai Chew* v. *Colding et Al.*).

II.—Position of Aliens

i.—Subjection to Territorial Sovereignty of Receiving State.

Aliens—Position of—Alien Ordinarily Resident—Whether Liable for National Service—Irish Citizen Resident in England—British Nationality Act, 1948—Ireland Act, 1949—National Service Act, 1948.

Bicknell *v.* Brosnan.

England, Court of Criminal Appeal. April 24, 1953.

(Lord Goddard C.J.; Lynskey and Parker JJ.)

The Facts.—This was a case stated by the Bristol Justices. The prosecutor preferred an information against Patrick Brosnan, charging him with being a person subject to registration under the National Service Act, 1948, and having failed to comply with the requirements thereof.

The defendant was born at Tralee in what was then the Irish Free State and is now the Republic of Ireland. He lived in Ireland until May 1949, when he came to England as a builders' labourer, and, apart from one month's holiday in Ireland, had resided continuously in England since May 1949. He intended eventually to return to Ireland to make his permanent home there, but there was no certainty when he would do so. In 1952, there was served on the defendant a written notice in the prescribed form requiring him to submit to examination by a medical board. He replied by a letter of September 27, 1952: " The enclosed papers are no concern of mine. I am an Irish citizen therefore you have no claim on me, which means no medical exam."

The Justices were of opinion that the defendant was not a British subject and dismissed the information. The prosecutor appealed.

Held: that the defendant was liable for national service, as the combined effect of s. 3 (2) of the British Nationality Act, 1948, and s. 3 (1) of the Ireland Act, 1949, is to render the provisions of the National Service Act, 1948, applicable to citizens of the Republic of Ireland who are ordinarily resident in the United Kingdon within the meaning of s. 34 (4) of the National Service Act.

Lord Goddard C.J. said: " The material sections which we have to consider are, first, s. 1 (1) and s. 34 (4) of the National Service Act, 1948. Section 1 (1) provides that every male British subject ordinarily resident in Great Britain between the ages of eighteen and twenty-six, subject to certain excepted classes which are immaterial for the purposes of this case, shall be liable to be called on to serve in the armed forces of the Crown, and the Act contains consequential provisions for the registration of people liable for service and for their medical examination: see s. 7 and 8. Section 34 (4) provides:

> ' For the purposes of this Part of this Act, a person who is resident in Great Britain shall be deemed to be ordinarily resident there unless—(a) he is residing there only for the purposes of attending a course of education; or (b) the circumstances of his residence in Great Britain are otherwise such as to show that he is residing there for a temporary purpose only; or (c) being a person who is, under the provisions of any Act in force in any part of [Her] Majesty's dominions outside Great Britain, a national or citizen of that part within the meaning of that Act, or a person who was born or is domiciled in any such part of [Her] Majesty's dominions or in a British protectorate, a mandated territory, a trust territory or any other country or territory being a country or territory under [Her] Majesty's protection or suzerainty, he has been resident in Great Britain for less than two years.'

We shall refer at the end of this judgment to the exception contained in s. 34 (4) (c). As the justices held that the respondent was not a British subject, they did not find it necessary to deal with the question whether his residence was only temporary and we shall dispose of this point at once. On the evidence it is impossible to hold that he is a mere temporary resident. Clearly, a temporary resident for this purpose means a person who is paying a visit, whether for social or business purposes, and merely making a short stay. This is emphasised by the fact that a person resident for the purpose of attending a course of education, which might easily last three or four years, is especially exempted by s. 34 (4) (a) of the Act. The respondent is here for an indefinite period and the fact that he intends to return at some unspecified date, so that he retains his Irish domicil, does not make him a temporary resident so as to bring him within s. 34 (4) (b) of the Act.

" We have, therefore, to consider whether for the purposes of the National Service Act, 1948, the respondent is to regarded as a British subject or, at any rate, as liable to be called on for service, and the material sections that we have now to consider are contained in the British Nationality Act, 1948. That Act and the National Service Act were both passed on July 30, 1948, and both came into force on January 1, 1949. It is material to observe that up to that time Irish citizens ordinarily resident in this country were liable to the provisions of the Acts then relating to national service. By s. 1 (1) of the British Nationality Act:

> ' Every person who under this Act is a citizen of the United Kingdom and colonies or who under any enactment for the time being in force in any country mentioned in sub-s. (3) of this section [which are the countries commonly referred to as the dominions] is a citizen of that country shall by virtue of that citizenship have the status of a British subject.'

Eire is not mentioned in that section: By s. 2 (1) citizens of Eire who were immediately before the commencement of the Act British subjects were given an option to remain British subjects provided that they satisfied certain conditions. Then s. 3 (2) provides:

> ' Subject to the provisions of this section, any law in force in any part of the United Kingdom and colonies or in any protectorate or United Kingdom trust territory at the date of the commencement of this Act, whether by virtue of a rule of law or of an Act of Parliament or any Act of Parliament passed before that date comes into force in any such place as aforesaid on or after that date, shall, until provision to the contrary is made by the authority having power to alter that law, continue to have effect in relation to citizens of Eire who are not British subjects in like manner as it has effect in relation to British subjects.'

The only construction that the court can put on this sub-section is that the whole of the English law, whether common law or statute, in force at the date of the commencement of the Act is applied to citizens of Eire in like manner as it is to British subjects, and that the statute law applied to them includes any law passed before the commencement of the Act but which comes into force on or after that date which, as we have already said, is Jan. 1, 1949. As by the terms of that sub-section the law, whether common law or statute, in force at that date is to continue to have effect with relation to citizens of Eire who were not British subjects in like manner as it has effect in relation to British subjects, it seems to us that that must mean that citizens of Eire are to be treated for the purpose of such Acts in exactly the same way as though they were British subjects. It may at first sight seem that s. 3 (2) of the British Nationality Act is a somewhat obscure method of applying the National Service Act to citizens of Eire ordinarily resident in this country, but, as the Solicitor-General pointed out, as the two Acts were passing through Parliament together it would have been difficult and contrary to Parliamentary practice to apply expressly the provisions of the British Nationality Act while it was still only a Bill to the National Service Act which was also only a Bill, and not law, at the time when the former Act was passing through Parliament. But whatever the reason, it appears to us that, applying to s. 3 (2) of the British Nationality Act the ordinary canons of construction, which require a court to give the plain grammatical meaning to the words used, it is impossible to hold that the provisions of an Act, which had been passed before the British Nationality Act and which came into force on the same day as that Act, are not effective so as to make a citizen of Eire who is ordinarily resident here, and is not within the excepted classes mentioned in sched. I to the National Service Act, subject to its provisions.

"It is unnecessary for the purposes of this judgment to deal with s. 3 (1) of the British Nationality Act, as it would not appear to have any application to the facts of this case, but we would add that, as the National Service Act, 1948, is a consolidating Act, if it was intended to exempt persons hitherto liable for service, as the citizens of Eire were at the time of its passing, one would expect to find that they were exempted by clear words. The Ireland Act, 1949, s. 1 (3), provides that that part of Ireland theretofore known as Eire is to be referred to thereafter as the Republic of Ireland. It is, however, specially provided by s. 3 (1) (a) of that Act that the operation of the provisions of the British Nationality Act, 1948, and, in particular, s. 2, s. 3 and s. 6 thereof is not affected by the fact that the Republic of Ireland is not part of Her Majesty's dominions, and, by s. 3 (1) (b), reference in the said provisions to citizens of Eire include, on their true construction, references to citizens of the Republic of Ireland. It is enough to say that the effect of s. 3 (1) and s. 3 (2) (a) of that Act, coupled with s. 34 (4) (c) of the National Service Act, seems to be that, if a citizen of the Republic of Ireland has been resident in Great Britain for less than two years, he is not to be regarded as ordinarily resident here, but, as the respondent has been resident here since 1949, it follows that he is to be regarded as ordinarily resident here. The effect of the various statutory provisions to which we have referred is that a national or citizen of the Republic of Ireland who is ordinarily resident in Great Britain, and is of the appropriate age and not in one of the excepted classes, is subject to the National Service Act, and, accordingly, we allow this appeal with costs and send the case back to the justices with a direction to convict."

[Report: [1953] 2 Q.B. 77.]

Aliens—Treatment of—Subjection to Local Law—Criminal Offences—Traffic Offences—Necessity for Personal Appearance in Criminal Proceedings—Reasons of Convenience—The Law of Sweden.

PUBLIC PROSECUTOR *v.* ZONDERVAN.

Sweden, Supreme Court. January 10, 1952.

THE FACTS.—Zondervan, a Dutch citizen domiciled in Amsterdam, was driving a car in Sweden, when, through keeping to the right —Sweden having left hand traffic—he collided with another car on a curve and at a time of poor visibility. The cars were damaged, and Zondervan and four other persons sustained minor injuries. The Public Prosecutor requested the District Court to issue a summons with a view to a conviction. To his request he appended a power of attorney which Zondervan had issued designating a lawyer in Sweden to receive the summons and to defend him in the action that might be brought against him as a result of the accident.

Held (by the District Court): that the request for a summons must be rejected. There appeared to be no reason to believe that Zondervan was still in Sweden. The prohibition, in Chapter 1, § 2, of the Swedish Penal Code,[1] of prosecution of this kind of case could not be overcome by the device of sending the summons to the attorney.

The Prosecutor appealed. He referred to a memorandum by a Swedish scholar who supported a broad interpretation of the provision in question so as to include the case where the foreigner was represented by an attorney. At the present time, especially considering a Convention of 1948 between Sweden, Denmark and Norway concerning the recognition and execution of judgments in criminal cases, there seemed to be good reasons in favour of such an interpretation. If it were not accepted, the result would probably be that for a longer or shorter period of time a foreigner would not be allowed to leave the country after an offence of perhaps a minor character.

Held (by the Court of Appeal): that the appeal must fail. No further reasons were given.

The Public Prosecutor appealed to the Supreme Court. He argued that owing to the development of international communications the question of upholding the Swedish legal order in relation to foreigners violating it and committing offences during a temporary stay had become of importance. The procedural measures of arrest, arraignment and prohibition to leave the country could be used against foreign citizens even for the purpose of punishing minor offences. When some such measure was used, however, it should be chosen so as to assure that, considering the character and kind of the offence, the limitation upon the personal freedom of the foreigner should not be too severe. There was no problem in cases in which proceedings could be brought immediately. In many cases, however, the offence required an investigation, often detailed and time-consuming. This was true, in particular, of the ever increasing traffic violations, by foreigners, of the laws concerning the import or export of goods subject to duty and of the present currency regulations. In such cases considerable time necessarily passed before proceedings could be brought; if the person concerned was to be notified personally, he would have to remain in Sweden. It was natural to seek the solution primarily by inquiring whether Chapter 1, § 2, of the Penal Law permitted an interpretation to the effect that notice of proceedings in a criminal case against a foreigner were given to his authorized agent and that it did not preclude the trial of a foreigner who was only represented by an attorney in this country. A rejection of that interpretation would have far-reaching consequences. The provisions in Chapter 1, §§ 1 and 2, of the Penal Law were expressions of the principle that crimes committed in Sweden fall under Swedish jurisdiction regardless of the nationality of the offender. Our law was based upon the principle of territoriality. The preparatory work behind the present provision did not support the view that the expression " in the country " was intended as a limitation upon the substance of that principle. In the application of the principle of territoriality the question as to how a penalty should be executed in the case of a foreigner not present in this country was one of procedural law. For the question of the application of the Penal Law to a foreigner who had left the country and was not expected to return, the decisive factor was whether or not the procedural conditions were fulfilled for the application of the penal law. In the opinion of the prosecuting authority this was the case in the present instance. Zondervan could be notified of the action in a manner permitted by the procedural law, and it should be noted that by appointing an attorney he must be considered to have expressed his intention to submit to Swedish jurisdiction. The traffic violation committed by him appeared to be such that the case might be decided without him or his attorney being personally present. No importance should be attached to the fact that there was no treaty between Sweden and the Netherlands for the execution of penal sentences or the enforcement of awarded damages.

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[1] This provision reads in part as follows: "A foreigner who is in the country shall be judged by Swedish law and in a Swedish court for a crime that he has committed in the country . . ."

Held (by the Supreme Court): that the appeal must succeed. The Court said: " The provisions in Chapter 1, § 2, of the Penal

Law cannot be regarded as barring the bringing of an action in a Swedish court for a crime committed in this country by a foreigner who, although abroad, has, as in the present instance, appointed an attorney in this country and authorized him to receive notice of the action.

"As the investigation does not show that Zondervan's personal appearance would be needed for the trial of the case, the summons may be sent to the attorney."

The Court rescinded the decisions of the courts below and referred the case back to the District Court.

[Report: *Nytt Juridiskt Arkiv*, 1952, p. 29.]

NOTE.—Although this case is concerned primarily with Swedish law, it has been included, with some hesitation, as bearing upon the treatment of aliens. It is an instance of the judicial interpretation of a statute in a manner calculated, in the interest of growing international intercourse and travel, to facilitate the position of aliens as subject to the full jurisdiction of the State in which they happen to be present, however temporary their stay.

iii.—Treatment by and Responsibilities of the Receiving State.

[*See also* PART V, STATE RESPONSIBILITY.]

Aliens—Treatment of—Right of Non-resident Alien to Inherit Property from Resident of State Concerned—Construction of Treaties—Requirement of Reciprocity—The Law of the United States of America.

In re ARBULICH'S ESTATE; ARBULICH *v.* ARBULICH.

United States, Supreme Court of California. May 26, 1953.

THE FACTS.—See *International Law Reports*, 1952, Case No. 92. This was a further appeal, from the judgment of the California Court of Appeal reversing the judgment of the Probate Court awarding distribution of the estate of the decedent to an heir who was a citizen and resident of the United States to the exclusion of one who was a citizen and resident of Yugoslavia. The Probate Court had found that on the decedent's death, the reciprocal inheritance rights prescribed by s. 259 of the Probate Code of California did not exist between residents and citizens of the United States and Yugoslavia. Section 259 of the Probate Code provided at that time:

"The right of aliens not residing within the United States or its territories to take real property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take real property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents and the right of aliens not residing in the United States or its territories to take personal property in this State by succession or testamentary disposition, upon the same terms and conditions as residents and citizens of the United States is dependent in each case upon the existence of a reciprocal right upon the part of citizens of the United States to take personal property upon the same terms and conditions as residents and citizens of the respective countries of which such aliens are residents. It shall be presumed that such reciprocal rights exist and this presumption shall be conclusive unless prior to the hearing on any petition for distribution of all or a portion of such property to an alien heir, devisee or legatee not residing within the United States or its territories a petition is filed by any person interested in the estate requesting the court to find that either one or both of such reciprocal rights does not or do not exist as to the country of which such alien heir, devisee or legatee is resident . . . ."

Held: that the judgment of the Probate Court must be affirmed. Neither the law of Yugoslavia, nor the Treaty of Commerce between the United States and Serbia, concluded at Belgrade on October 2/14, 1881 (22 Stat. 963), nor the testimony of the Ambassador of Yugoslavia established that citizens of the United States have the reciprocal right of inheritance required by the California Probate Code. The Yugoslav heir was therefore not entitled to receive the estate.

The Court, after setting out the evidence which had been adduced, said: ". . . It is apparent that the evidence summarized hereinabove is sufficient to support a finding that on the date of decedent's death in 1947 reciprocal rights did not exist with respect to real property. In the decree of July 16, 1946 (which remained in effect until invalidated by the decree of March 20, 1948), it is declared that foreign citizens may acquire real property 'by legacy (in case of death) only by previous approval of the competent government agency,' and that such limitations shall not refer to acquisitions by 'legal inheritance.' As already noted herein, no standards are provided to guide either the government agency or a testator in determining in what situations, if any, such acquisition by legacy would be approved, and it is inferable that the granting, the withholding, or the conditions of granting, approval may vary from case to case according to the discretion of the governmental agency as exercised in an unbounded field and unguided by standards of equality of application. The situation thus appears to be comparable to that before the court in *Estate of Schluttig* (1950), . . . 36 Cal.2d 416, 425, 224 P. 2d 695 in which it was held that when 'the taking of estates by testamentary disposition or succession is a matter of sufferance determinable in accordance with directions of the Nazi officials and their concepts of national sentiment, there is no "reciprocal right" as that term is used in the Probate Code.'

"Furthermore, it is to be noted that section 259 of the Probate Code, which is here involved, limits the right of the nonresident alien 'to take real property in this State by succession or testamentary disposition,' to those instances where there is 'a reciprocal right upon the part of citizens of the United States to take real property upon the *same terms* and *conditions* as residents and citizens' (italics added) of the country of the alien's residence. That the terms and conditions on which foreigners may acquire real property in Yugoslavia by testament differ from those on which it may be so acquired by Yugoslav citizens is a reasonable inference to be drawn from the decree of July 16, 1946. Although the provisions of the decree of March 20, 1948, and of the interpretation thereof by Yugoslav authorities which is set forth in the consular letter of January 19, 1949, do not directly establish Yugoslav law as of the date of the testator's death herein (March, 1947), they do tend to confirm that under the decree of July 16, 1946, a differentiation was established between the right of foreigners who are natural heirs of the deceased to succeed to real estate 'by legal inheritance' and any rights claimed by other foreigners to take real estate 'by legacy (in case of death).'

"Appellant contends, nevertheless, that the provisions of Article II[1] of a treaty entered into in 1881 between the United States and the Kingdom of Serbia, 22 Stat. 964 (of which the present Republic of Yugoslavia is the successor government) and certified by the Secretary of State of the United States as remaining in full force and effect between this country and Yugoslavia, are applicable and controlling in appellant's favor on the issue of reciprocity. It may be noted that the first paragraph of Article II seemingly treats only of 'citizens of the United States in Serbia [Yugoslavia] and Serbian [Yugoslav] subjects in the United States,' rather than, as is the situation in the present case, of a United States citizen who dies in the United States and leaves property to a Yugoslav subject who is *in Yugoslavia*, and therefore is not here applicable. Even if we assume its applicability in that respect, however, the rights granted are only those given by each of the contracting nations 'to the subjects of the most favoured nation,' and do not purport to equal the rights given or guaranteed by each of the contracting nations to *its own* citizens. Consequently the treaty provisions do not establish the reciprocal rights required by the Probate Code.

[1] Article II of the Treaty reads as follows:

"In all that concerns the right of acquiring, possessing, or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favoured nation.

"Within these limits, and under the same conditions as the subjects of the most favoured nation, they shall be at liberty to acquire and dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts, or charges whatever other or higher than those which are or shall be levied on natives or on the subjects of the most favoured state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives, or by the subjects of the most favoured state."

"Testimony by the Ambassador of Yugoslavia to the United States that 'Yugoslavia accords to citizens and residents of the United States their full and equitable rights of inheritance under . . . the Convention [treaty] of 1881, . . . [and that] whether the Convention itself is applicable or not . . . Americans do have their full, complete and unabridged rights of inheritance to inherit from their relatives or from their estate in Yugoslavia,' serves at most to create a conflict in evidence as to the ultimate fact and is not controlling on the issue of reciprocity. Upon the record we are bound to hold that the evidence is not as a matter of law insufficient to support the finding of the trial court that at the time of decedent's death reciprocal rights within the meaning of the applicable statute did not exist as to real property.

"As to whether reciprocity existed with respect to personal property, there is a substantial conflict of opinion evidence and both appellant and respondent urge that evidence of that nature, offered by the other, was improperly received. We need not pass upon such contentions, however, because it does not appear that the errors, if any, in regard to the admission of opinion evidence were prejudicial. In the light of the other evidence upon the subject, hereinafter mentioned, we do not think it likely that a different result would have been reached in the trial court if the disputed opinion evidence had not been received. (Cal.Const., art. VI, § 4½.)

"Aside from the expressions of opinion, a copy of the Yugoslav Constitution, as hereinabove mentioned, and copies of Yugoslav decrees governing transactions with foreign countries and their nationals were received in evidence without objection, and such Constitution and decrees in themselves support the finding of the trial court that reciprocity did not exist with respect to personal property. . . . [The Court here analyzed the relevant Yugoslav law, and continued:] ". . . Appellant urges that the 'Foreign Exchange Law' has no materiality in relation to the question of reciprocity; that it is merely 'regulatory of foreign exchange and has no reference whatever to rights of inheritance.' But a reading of the entire substance of the documents mentioned makes it apparent that the trial court was justified in reaching the conclusion that under Yugoslav law a citizen of the United States, at the time of decedent's death, had no definitely ascertainable and enforceable right to *receive* Yugoslav property by testament, and that the receipt of any such property would depend in each case upon the largely, if not entirely, uncontrolled discretion of the Minister of Finance. This is far different from a standardized regulation which might merely delay the transmission of gold, money, or other stores of value from one nation to another. (See *Estate of Schluttig* (1950), 36 Cal.2d 416, 425, 224 P.2d 695; cf. *Estate of Miller* (1951), *supra*, 104 Cal.App.2d 1, 12, 13, 230 P.2d 667.) Here it is pertinent to observe, as was declared in *Estate of Blak* (1944), 65 Cal.App.2d 232, 238, 150 P.2d 567; 'The " right " to take property by inheritance and the " right to receive " that inheritance by payment in money, have long been recognized as part of the substantive, legal and sanctioned incidents of the normal legal order of society. . . . The " right " to receive the benefits of the inheritance is a necessary and inherent corollary to the " right " to take by inheritance. One is not separable from the other. The one includes the other. If the right to take exists . . . the right to receive exists . . . '

" Upon the record before us, which includes the Constitution and the Resolutions and Decrees of Yugoslavia as above mentioned, we cannot hold that as a matter of law the trial court was not justified in concluding that whether a citizen of the United States, as of the date of decedent's death, might in any particular case actually receive possession and marketable title to real estate in Yugoslavia devised to him or personal property, or its value, bequeathed to him, was a matter of grace or individual indulgence rather than of right based on uniform law. . . ."

One Judge dissented and expressed agreement with the views of the Court of Appeal.

[Reports: 41 Cal.2d 86, 257 P.2d 433; *certiorari* denied, 346 U.S. 897, 74 Sup.Ct. 219, 98 L.Ed. 398 (1953).]

Aliens—Position of—Right to Due Process of Law—Resident Alien Lawfully Present in the United States—Right to Leave the United States—Right of Immigration Authorities to Prevent Departure without Hearing—The Law of the United States of America.

HAN-LEE MAO *v.* BROWNELL.

United States, Court of Appeals, District of Columbia Circuit.
September 4, 1953.

THE FACTS.—Han-Lee Mao, a national of China, had come to the United States in 1947 on a passport of the Chinese Nationalist Government. In 1951, after he had acquired a master's degree in oceanography, he attempted to return to China. His departure was prevented by an order of the Attorney-General, issued pursuant to the Passport Act of 1918, 40 Stat. 559 (1918), as amended (then in effect), as implemented by a presidential proclamation and by regulations. An affidavit of the Commissioner of Immigration and Naturalization stated:

" . . . the basis of this order was a finding that if he [Mao] were permitted to go to Communist China, whose armies were and are engaged in armed combat with the military forces of the United States in Korea, plaintiff's scientific training and knowledge might be utilized by Communist China and other potential enemies of the United States in seeking to undermine and defeat the military and defensive operations of this Nation, and that his departure at the present time consequently would be prejudicial to the best interests of the United States."

Mao sued in the United States District Court for the District of Columbia for a declaration of rights and to enjoin the enforcement of the order which denied him permission to depart, on the ground that the Passport Act of 1918, as applied to him, was unconstitutional. A special three-Judge District Court found no substantial constitutional issue and returned the case to a single Judge, who dismissed the complaint for failure to state a claim upon which relief could be granted.

On appeal,

Held: that the order of dismissal must be reversed, and the case remanded to the District Court for entry of a judgment declaring the order of the Attorney-General null and void and enjoining him from denying exit permission to Mao without first giving him a full and fair hearing. A resident alien, lawfully present in the United States, was entitled to due process of law, even though he was not a permanent resident in the sense of having an intention to spend his life there.

The Court said: "... the order of dismissal entered by the single district judge to whom the case was returned amounted to a holding that the Attorney-General acted within the legislative grant of authority and that he violated no constitutional right of the appellant in acting as he did. Mao is entitled, as the government concedes, to judicial review of that holding.

" Courts ordinarily regard it as beyond their province to interfere with the exercise of what has been aptly called the 'peculiarly political' sovereign power of the United States to deal with aliens. For example, in *Harisiades* v. *Shaughnessy*, 1952, 342 U.S. 580, 588, 72 S.Ct. 512, 519, 96 L.Ed. 586,[1] the Supreme Court said:

> '... [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war powers, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.'

But, as the Court was careful to imply, governmental policy toward aliens is not wholly immune from judicial power. The political branches of government cannot deny the protection of the Fifth Amendment to an alien who is entitled to invoke it.[2]

[[1] See *International Law Reports*, 1952, Case No. 69.]

[2] In *Yamataya* v. *Fisher*, (*The Japanese Immigrant Case*), 1903, 189 U.S. 86, at pages 100–101, 23 S.Ct. 611 at page 614, 47 L.Ed. 721, it was said:

"... But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will

" The case turns on the question whether a due process hearing is a condition precedent to an order forbidding Mao, who is not an enemy, to leave the country. The fact that the Passport Act does not in terms require the Attorney General to grant a hearing before denying exit permission does not necessarily mean that the alien is not entitled to be heard, for if the Constitution requires a hearing, the statute must be read as commanding that it be afforded. *Yamataya* v. *Fisher*, (*The Japanese Immigrant Case*,) 1903, 189 U.S. 86, 23 S.Ct. 611, 47 L.Ed. 721; *Wong Yang Sung* v. *McGrath*, 1950, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616.[1] In the latter case, the Court said, 339 U.S. at page 49, 70 S.Ct. at page 454:

' . . . The constitutional requirement of procedural due process of law derives from the same source as Congress' power to legislate and, where applicable, permeates every valid enactment of that body.'

" It has been held that ' Whatever the procedure authorized by Congress, it is due process as far as an alien denied entry is concerned.'[2] But that is not the rule with respect to a resident alien who is lawfully present in the United States. He is protected by the Fifth Amendment from being deported or detained without due process of law. Of many cases to that effect, perhaps the most frequently cited is *The Japanese Immigrant Case*, from which we have quoted in note [2] above. There the Supreme Court said that an alien who has entered the country and become subject to its jurisdiction is ' part of the population,' and cannot be deported by any executive officer unless he is given an opportunity to be heard upon the questions involving his right to be and remain in the United States. We think it equally true that an executive officer cannot detain in this country an alien lawfully resident here without first giving him a chance to be heard on the questions involving his right to leave the United States.

" Kwong Hai Chew, the alien involved in the recent case of *Kwong Hai Chew* v. *Colding*, 1953, 344 U.S. 590, 73 S.Ct. 472, had bought a home, applied for naturalization, and perhaps given other indications of an intention to maintain permanent residence in the United States. In his case the Supreme Court said, 344 U.S. at page 596, 73 S.Ct. at page 477 [see *infra*, pp. 343 *et seq.*]:

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secure the prompt, vigorous action contemplated by Congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized."

[1] See *International Law Reports*, 1950, Case No. 76.]

[2] *Knauff* v. *Shaughnessy*, 1950, 338 U.S. 537, 544, 70 S.Ct. 309, 313, 94 L.Ed. 317 [*Annual Digest*, 1949, Case No. 74]; *Nishimura Ekiu* v. *United States*, 1892, 142 U.S. 651, 660, 12 S.Ct. 336, 35 L.Ed. 1146.

'1. It is well established that if an alien is a lawful permanent resident of the United States and remains physically present there, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.'

"We do not think the Court intended, by using the word 'permanent' in this statement from Chew's case, to hold or imply that a resident alien, in order to be entitled to Fifth Amendment protection, must intend to spend his life here. The statement was carefully worded to fit the case in hand and was not intended, we think, to limit constitutional protection to an alien whose residence is permanent in the strictest sense of the word. This is borne out by the fact that the Chew opinion quotes with apparent approval from a concurring opinion in an earlier case which says the Fifth Amendment extends to an alien who 'enters and resides in this country,' without reference to the length or permanence of residence.[1] That statement is in accord with the holding of numerous previous cases.

"We rely upon the Chew case as additional authority for holding the appellant entitled to invoke the Fifth Amendment. As he lawfully entered in 1947 and has lawfully remained in the United States, he is 'part of its population,' to the extent at least of having the right to a due process hearing before an executive officer can detain him here against his will. He was not afforded such a hearing."

[Report: 207 F.2d 142.]

NOTE.—(1) The above case is noted in *Harvard Law Review*, 67 (1953), p. 341.

(2) On May 29, 1954, the United States announced that, since 1951, 434 Chinese students had applied for exit permits, and 314 of these had been permitted to depart. For security reasons similar to those prevailing in the above case, exit permits were temporarily refused to the other 120: *Department of State Bulletin*, 30 (1954), p. 949. The Department of State announced the rescission of restraining orders as to 76 further students as from March 31, 1955: *ibid.*, 32 (1955), p. 627. An "Agreed Announcement" by the Ambassadors of the United States and of the People's Republic of China made at Geneva on September 10, 1955, stated that the Ambassador of the United States had informed the Ambassador of the People's Republic of China that:

> "The United States recognizes that Chinese in the United States who desire to return to the People's Republic of China are entitled to do so and declares that it has adopted and will further adopt appropriate measures so that they can expeditiously exercise their right to return." (*Ibid.*, 33 (1955), p. 456.)

[1] *Bridges* v. *Wixon*, 1945, 326 U.S. 135, 161, 65 S.Ct. 1443, 1455, 89 L.Ed. 2103, where it was said in the course of the concurring opinion:

"... Once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments .... None of these provisions acknowledges any distinction between citizens and resident aliens."

On December 16, 1955, the Department of State declared that no Chinese national had been refused exit from the United States, and referred to protests by the United States against the continued detention of nationals of that country by the People's Republic of China in violation of the terms of the Agreed Announcement of September 10, 1955: *ibid.*, 33 (1955), p. 1049.

Aliens—Treatment of—Treaty Providing for National Treatment—National Treatment for Relationship between Landlord and Tenant—Reciprocity—The Law of France.

GIRARD *v.* ZADRA.

France, Court of Appeal of Paris. March 4, 1953.

THE FACTS.—By virtue of French legislation on the law of landlord and tenant a landlord is entitled—in certain specified cases—to claim the eviction of a tenant (after due notice) if, *inter alia*, he urgently requires the premises for his own occupation. The benefit of this legislation is conferred only on landlords of French nationality. By virtue of an Agreement on Emigration of March 21, 1947, between France and Italy, the subjects of each Contracting Party are entitled, in the territory of the other, to the same rights as nationals in so far as concerns the law of landlord and tenant. Some time prior to the institution of the present proceedings an order for possession had been made in favour of a French national (the appellant herein). In the Court of first instance in the present proceedings the respondent then obtained an order for possession against the appellant, and the latter now appealed against that order. It was contended on his behalf that as the French legislation referred to above was designed to benefit only French nationals, he was entitled to retain possession, and that his appeal should accordingly be allowed. On behalf of the respondent it was contended that as the Agreement on Emigration between France and Italy provided for national treatment, she was entitled to the order which she had obtained in the Court of first instance, and that the appeal should accordingly be dismissed.

Held: that as the Agreement provided for national treatment and as Italian municipal law expressly provided for reciprocity in the matter, the appeal must be dismissed.

The Court said: "The appellant confines himself to the contention that as Mrs. Z. is of Italian nationality she cannot claim the benefit of Article 20 of the Law, which is reserved for landlords of French nationality. The Law of May 28, 1943, provides that 'notwithstanding any restrictive provisions, the general law or emergency legislation concerning leases necessarily leaves unaffected (*réserve*) the case of nationals of foreign countries which confer on French nationals the benefits of identical legislation'. There is proof that in so far as concerns legislation on leases, French nationals in Italy enjoy the same rights as Italian nationals. This follows from the Franco-Italian Agreement on Emigration of March 21, 1947, which has been implemented in Italy by Decree No. 730 of April 10, 1948. There are also in existence in Italy legal provisions analagous to the right to obtain possession contained in Article 20 (3) which has been relied upon in the present case, because Article 4 of the Italian Law No. 253 of May 23, 1950, provides as follows:

'The landlord (owner) may (obtain possession) . . . if he proves urgency and pressing need . . . of occupation by himself, his children or parents. . .'

It follows that, although of Italian nationality, Mrs. Z., who has been evicted by virtue of Article 19, can take advantage of the right to regain possession as provided in Article 20 (3), which is—as a general rule—reserved for French landlords, because the nationals of our country can take advantage of analogous legislation in Italy."

[Report: *Dalloz*, 1953, *Jurisprudence*, p. 241.]

Aliens—Treatment of—Commercial Activities—Permission to Engage in—Meaning of "Gainful Employment"—The Law of Switzerland.

In re SCHIRER.

Switzerland, Federal Tribunal. May 8, 1953.

THE FACTS.—On April 5, 1952, the police (*Polizeirichteramt*) of Zürich imposed upon Schirer, an Austrian national, a fine of 80 frs. for violation of the Federal Law concerning the Establishment of Aliens. It was stated that Schirer had lived in Zürich from July 1950 to March 1952, and had during that period carried out various commercial transactions without having the necessary permit. On January 23, 1953, the District Court of Zürich acquitted Schirer of that charge, on the ground that he had not acquired a residence in Switzerland at the material times, and had not received remuneration from a Swiss firm.

On appeal from that decision, it was contended on behalf of the Police Department that the requirement of a permit for gainful employment was not dependent either on permanent residence in Switzerland or on remuneration by a Swiss firm.

Held: that the appeal must be allowed. Aliens entering the country for the purpose of gainful employment were required to register within eight days. After that time any such employment was prohibited even if it was not remunerated by a Swiss firm.

The Court said: "An alien who enters the country for the purpose of gainful employment must register with the Aliens Department of the place where he is staying within eight days, and in any case before taking up employment. During the time limited for registration, he may be gainfully employed without a permit, provided that he does not obtain regular employment. After that time, any gainful employment requires a permit. Only an alien who has been granted permission to settle in the country may be gainfully employed without police restriction.

"Accordingly, it is immaterial, in relation to the question whether the respondent, who did not have a permit to settle in the country, could carry out commercial transactions in the country even after the expiration of the eight-day time limit, whether he lived in a leased apartment or, as maintained by counsel for the defence in the cantonal proceedings, in a pension. Every alien who is present in Switzerland without authorization to settle there requires a permit if he enters employment or if, after eight days, he is otherwise gainfully employed.

" 'Gainful employment' is 'entering regular employment or any other activity normally exercised with a view to gain'. It thus does not presuppose remuneration only by a person or body corporate established in Switzerland. A person who is remunerated from abroad, or who makes profits out of business on his own account, is also gainfully employed. Article 3, para. 1, of the Law concerning Establishment of Aliens does not even require proof that the alien actually received money; it is sufficient to prove activities 'normally' pursued with a view to gain, *i.e.*, exercised, according to common experience, for the sake of gain.

" It is not necessary to decide whether a person who, as owner or employee of a foreign industrial or commercial establishment, makes purchases in Switzerland, is considered to be gainfully employed within the meaning of that provision. The respondent is not alleged to have engaged in such activities, but to have acted in Switzerland as an independent commercial agent. That is normally done with a view to gain, and the respondent has admitted that he was in fact paid for what he did."

[Report: *Arrêts du Tribunal fédéral Suisse*, vol. 79 (1953), IV, pp. 37–42.]

Aliens—Treatment of—Exercise of Professions—Profession of Architect.

VAN BOGAERT AND THE ROYAL ASSOCIATION OF ARCHITECTS OF ANTWERP *v.* BELGIAN STATE (MINISTER OF EDUCATION).

Belgium, Conseil d'État. December 10, 1952.

THE FACTS.—By a Royal Decision of December 27, 1951, one Reyntjens, a national of the Netherlands, was authorized to exercise the profession of architect in Belgium. The Association of Architects of Antwerp, where Reyntjens worked, now sought to obtain the annulment of that decision on the ground that the Belgian State was not competent, under the Law of February 20, 1939, concerning the Protection of the Profession of Architect, to make it. It was contended on behalf of the Association that foreign architects could only be authorized to exercise that profession permanently in Belgium if the country of their nationality gave reciprocal treatment to Belgian nationals; this was not so in the case of the Netherlands.

Held: that the Royal Decision of December 27, 1951, must be annulled.

The Court said: " The Law of February 20, 1939, concerning the Protection of the Profession of Architect makes a clear distinction between architects of Belgian nationality and those of foreign nationality. Article 7 gives persons of Belgian nationality who satisfy the conditions set out in that Article the right to bear the title of architect and to exercise that profession. That Article does not apply to aliens. Article 8, para. 1, permits foreign architects to exercise their profession in Belgium to the extent that their country of origin grants reciprocity. In the absence of a reciprocity treaty with the Netherlands, no authorization under that paragraph could be granted in this case. Neither can the Royal Decision in this case be based on paragraph 2 of Article 8 of the Law. The Royal Decision authorizes Reyntjens to exercise the profession of architect, while paragraph 2 of Article 8 of the Law merely makes it possible to authorize persons of foreign nationality to act as architects in Belgium. The terms of that provision, as well as the preparatory work relating thereto, show clearly that such an authorization is not unlimited, but may be granted only in respect of a specific undertaking or for enterprises requiring the aid of foreign specialists. Contrary to that provision, the Royal Decision granted a permanent authorization applicable in respect of all work which may be carried out by an architect.

"Accordingly, in taking that decision, the State exceeded its competence."

[Report: *Pasicrisie belge*, 1954, I, p. 41.]

Aliens—Treatment of—Right to Exercise a Profession—Denial of—Right of Appeal.

DELGRANGE *v.* BELGIAN STATE (MINISTER FOR ECONOMIC AFFAIRS).
Belgium, Conseil d'État. July 3, 1953.

THE FACTS.—The complainant was of Belgian origin; he had been naturalized in Germany and had subsequently become stateless. On March 21, 1951, he submitted to the Minister for Economic Affairs a request for a permit to exercise the profession of translator-interpreter. That request was refused on the ground that it appeared from information received that he did not meet the required moral standards. The complainant appealed to the Conseil d'Enquête Économique, and the appeal was dismissed on the ground that it had not been shown that the reasons for the original refusal were invalid. The complainant now asked for the annulment of the decision of the Conseil d'Enquête Économique on the ground that the rights of the defence were not respected in that certain elements which were unfavourable to him, and which were contained in the file of the case, were not communicated to him. It was admitted on behalf of the Minister for Economic Affairs that before taking his decision the Minister had sought the opinion of the Aliens Department of the Ministry of Justice, which was opposed to the grant of the permit, and that this was the reason for the original refusal. It was contended, however, that the decision of the Conseil d'Enquête Économique would not have been affected even if the complainant had been informed of this unfavourable opinion—which was based on the activities of the complainant during the German occupation of Belgium—since that body would have evaluated the arguments of the complainant in the light of the views of the competent service.

Held: that the decision must be annulled and the case referred back to the Conseil d'Enquête Économique. In contentious proceedings the rights of the defence must be fully respected.

The Court said: "The Royal Ordinance of November 16, 1939, concerning the exercise of a profession by aliens, establishes a right of appeal to the Conseil d'Enquête Économique for aliens who, although resident in Belgium for more than five years, have been refused the necessary permit. That Ordinance intended that the right of appeal should be surrounded with precise safeguards. Each division of the Conseil d'Enquête Économique is presided over by a Judge. The alien may be assisted or represented before the Conseil by a barrister.

"It was clearly envisaged that the proceedings before the Conseil d'Enquête Économique would be contentious. This implies respect for the rights of the defence. An important document which was invoked against the complainant, was not transmitted to him. The procedure was thus irregular."

[Report: *Pasicrisie belge*, 1954, IV, p. 144.]

Aliens—Treatment of—Right of Non-resident Alien to Receive Bequest from Resident of State Concerned—Construction of Treaty —Effect of Executive Order Requiring Deposit of Bequest in Blocked Account—Function of Consul.

See p. 386 (*In re Braier's Estate*).

Aliens—Treatment of—Right to Due Process of Law.

See p. 330 (*United States ex rel. Dolenz* v. *Shaughnessy*).

v.—Respect for Property. Expropriation

[*See also* PART IV, JURISDICTION: A, I, Territorial.]

Aliens—Treatment of—Property of Aliens—Expropriation without Compensation—Expropriation by Iran of Property of Anglo-Iranian Oil Co.—Confiscatory Nature of the Expropriation—Question of Validity of Decree Purporting to Deprive an Alien of his Property—Purported Transfer of Title by Expropriating State—Nature of Concession Agreement—Whether a Treaty—Recognition of Acts of Foreign Governments Contrary to International Law—National Constitution—Right to Adjudicate on Validity of Foreign Nationalization Law—Presumption in favour of Conformity with International Law—Nationalization of Expropriated Oil Already Extracted when Nationalization Law Came into Force—Ownership of Expropriated Oil—International Law—Relation to Municipal Law—The Law of Japan.

ANGLO-IRANIAN OIL COMPANY *v.* IDEMITSU KOSAN KABUSHIKI KAISHA.

Japan, District Court of Tokyo (*Civil Ninth Division*). 1953.

High Court of Tokyo (*First Civil Affairs Section*). 1953.

(Yanagawa, President; Muramatsu and Nakamura JJ.)

THE FACTS.—This was an application for an interim order for the placing in the custody of the Court of certain petrol and light oil (hereinafter called " the oil ") imported from Iran into Japan by the respondents. The oil had been purchased in April 1953 by the respondents from the National Iranian Oil Co., but the applicants claimed the ownership of the oil on the ground that the National Iranian Oil Co. had had no right to sell it and the respondents had therefore acquired no title to the oil.

The oil was part of certain oil extracted and refined by the applicants under a Concession Agreement (hereinafter called " the Concession Agreement ") dated April 29, 1933, and made between the Government of Persia (the former name of Iran) and the Anglo-Persian Oil Co., Ltd. (as the applicants were formerly called). The extraction and refinement took place before the coming into force on May 1, 1951, of the Oil Nationalization Law of Iran (hereinafter called " the Nationalization Law ").

The applicants contended that even if the oil in question had not been refined before the Nationalization Law came into force, then in view of the fact that it was loaded in Southern Iran and had a high octane value, it must have been actually produced in the concession district granted to the applicants and refined in one of the applicants' refineries; therefore the oil should be held to be the property of the applicants. Under the Nationalization Law, on May 1, 1951, all the rights and interests in Iran of the applicants under the Concession Agreement were nationalized and acquired by the National Iranian Oil Company. The Nationalization Law deprived the applicants of their rights and interests without compensation contrary to the principle of international law that " No rights or interests of foreigners shall be infringed without payment of reasonable compensation " and for that reason it was invalid, the expropriation was invalid, and the National Iranian Oil Company was not entitled to the rights and interest in the oil of the applicants. It was true that Article 2 of the Nationalization Law provided that the Iranian Government could deposit a certain sum of money to meet such compensation, but this did not oblige that Government to pay compensation. It simply meant that the Government could pay compensation voluntarily. The expropriation under this Law, therefore, could not be called expropriation with reasonable compensation, and, in fact, no compensation had yet been paid to the applicants by the Iranian Government. (On January 9, 1953, the Court at Aden gave judgment in favour of the applicants upon similar reasoning.[1]) Further, the said Nationalization Law violated the provision in paragraph 3 of Article 21 of the Concession Agreement that neither party should annul the Agreement unilaterally. Moreover, despite the provision in the Agreement that any dispute between the parties should be referred to arbitrators appointed by the parties and if the arbitrators were unable to agree, an umpire was to be nominated by the President of the International Court of Justice, the Iranian Government refused such arbitration.

The applicants also contended that the attitude of the respondents in resisting their claim for the oil in reliance on the Nationalization Law amounted to an attempt to apply a foreign Law which violates the provisions of Article 29 of the Japanese Constitution and would result in violation of public policy as stipulated in Article 30 of the " Hōrei ".[2]

The respondents contended that under the Nationalization Law all the rights and interests of the applicants in Iran were expropriated and nationalized by the Government of Iran. This was not confiscation, it was expropriation with compensation. In the Nationalization Law the Government was authorized to appropriate sufficient moneys to provide compensation for the applicants, by depositing with the Bank Milli (Iran) or any other bank an amount up to the equivalent of 25 per cent. of the normal income from oil, and, in fact, such deposit account had already been opened with the said Bank. The applicants, being unwilling to negotiate directly with the Iranian Government on the matter of compensation, asked the British Government to negotiate on their behalf. The British Government applied to the International Court of Justice at The

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[1] See *Anglo-Iranian Oil Co., Ltd.* v. *Jaffrate and Others* (*The Rose Mary*), *infra*, p. 316.

[2] Law No. 10 of 1898, which embodies rules of private international law recognized in Japan. Article 30 reads:

> " In the application of foreign law—by virtue of preceding articles of this law—provisions thereof which are against public order and good morals shall not be applied."

Hague with regard to the oil dispute with Iran, contending that the measures taken by Iran were contrary to international law. The International Court of Justice, however, in its decision dated July 22, 1952,[1] held that the applicants' right of oil extraction granted in 1933 by the Government of the Iranian Empire was not such as may be termed an international treaty in nature, and was an agreement of a private law nature concerning rights and interests and made between the Government of a country and a foreign corporation. On this ground the British application was dismissed. The Nationalization Law, it was now contended, naturally superseded the Concession Agreement and rendered it no longer valid. It was in the exercise of the sovereignty of an independent State that Iran enacted her industrial nationalization Law; even in Britain a number of industries had been nationalized. The British Government had, however, attempted to check the sale of Iranian oil abroad. For example, early this year, when the Italian tanker "Miriella", of Supor, carrying crude oil from Iran, arrived in Venice on February 14, 1953, the applicants applied to the Court of Venice for the interim detention of the oil. The application was dismissed on March 11, 1953. In the present case the respondents on February 14, 1953, purchased oil from the National Iranian Oil Co., took delivery of the same at Abadan on April 13, 1953, and brought it to Japan by their own tanker " Nissho Maru ". As the National Iranian Oil Co. had been engaged in extracting, refining and selling oil under the sanction of the Government of Iran, the oil in question was the property of the said Company.

The Iranian Oil Nationalization Law was a law enacted and enforced by a sovereign State; no court outside Iran therefore (it was contended) had power to judge the validity or invalidity of that Law. The Law did not aim at confiscating the applicants' oil industry in Iran but was a law to expropriate it with compensation. The question of compensation, the question of the effect of the act of expropriation of rights and interests and the question of ownership of the oil were all entirely different questions; compensation was a matter that arose after expropriation had taken effect. That was a matter to be settled between the applicants and the Government of Iran. When an industrial nationalization law of a country was enforced, without discrimination, against nationals of the enacting State and aliens alike, such law would not infringe international law even if it did not provide for compensation unless there existed a special international treaty. There did not exist, as alleged by the applicants, a rule of international law that " No rights or interests of foreigners shall be infringed without payment of reasonable compensation ". In any event, the violation of international law is a matter on which no Japanese court is empowered to give judgment.

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[1] *Anglo-Iranian Oil Company Case* (Preliminary Objection): see *International Law Reports*, 1952, Case No. 114.

The respondents also contended that the principle that a court cannot judge whether the law of a foreign independent State is valid or not, should be followed.

Held (by the District Court of Tokyo): that the application must be dismissed. The Nationalization Law was valid, the applicants had lost all their rights and interests under the Concession, and they had no title to the oil in dispute. The Court said:

" [I. *Nature of Concession Agreement. Whether a Treaty.*]—In view of the terms of the Concession Agreement, it is presumed that all the oil shipped from the Port of Abadan (Iran) is oil which was extracted from the concession area and refined at the refinery owned by the applicants; therefore the Court must recognize that the oil which is the subject of this application would belong to the applicants by virtue of the Concession Agreement if the Nationalization Law was invalid or had not been enforced. Consequently, the question whether the oil belongs to the applicants or not hinges upon whether the Nationalization Law is valid or not, and whether or not the Court is empowered to adjudge its validity.

" The Court will first proceed to consider the nature of the Concession Agreement entered into between the Persian Government and the Anglo-Persian Oil Company in 1933. One party to the Agreement was the Persian Government. The other party is not a Government but is the Anglo-Iranian Oil Company, a foreign corporation having its head office in England. It follows therefore that this Agreement is not an international treaty or an agreement similar to a treaty. It must be regarded as a private agreement entered into between the Government of a certain country and a foreign corporation, in connection with the right to extract oil. The area in which the applicants were allowed to exercise their right was not a ' concession area ', nor was their right a ' concession right ' in the ordinary sense of the words. The applicants owned only a right to extract petroleum in Southern Iran, and to refine and sell the oil. Such a right must be regarded as a right based upon municipal law. That interpretation is also expressed in the majority Judgment of the International Court of Justice of July 22, 1952 (*supra*).

" If the rights and interests acquired by the applicants under the so-called Concession Agreement can be justly regarded as rights under the private municipal law of Iran, it follows that such rights and interests may properly be made subject to the municipal law.

" For reasons given below, this Court has no power to deny the validity of the Nationalization Law of Iran and is bound to recognize its validity. The Court therefore considers that the Concession Agreement has been terminated by the coming into force of the Nationalization Law and that oil extracted after the enforcement of the Nationalization Law, no matter whether or not it originated from the Concession Area and was refined at the refinery formerly owned by the applicants, does not belong to the applicants.

" The following are the Court's reasons for recognizing the validity of the Nationalization Law:

" [II. *Recognition of Acts of Foreign Governments Contrary to International Law.*]—The first point raised by the applicants is that the Nationalization Law is a confiscatory law by which an alien's interest has been confiscated without compensation; that it is therefore invalid in the eyes of international law; and that the courts of other countries cannot therefore uphold the validity thereof. It cannot be denied that there exists a rule of international law which makes an act of confiscating without compensation a foreign interest in a country a wrongful act under international law. As a result of that rule, a foreigner who suffers from such an act of confiscation, or his own Government acting in his interests, will naturally demand, and press the confiscating Government for, payment of compensation. However, the question whether or not the courts of a third State have power to declare such an act of another State invalid, or to deny the effect of the act, is quite a different proposition. This Court is not convinced that there exists a universally established principle of international law which answers the question in the affirmative. This Court considers that, if it were called upon to give effect within its own jurisdiction to a nationalization law promulgated by a State for the promotion of its own public welfare, then so long as the law does not violate the public policy of this country and also having regard to the requirements of international comity and of mutual respect for sovereign power between nations, this Court could not refuse to recognize the result of the application of such a law. Subject to the question whether the Nationalization Law is a confiscatory law or not, the applicants do not dispute the fact that the Nationalization Law is a law regularly enacted in accordance with the established legislative procedure of Iran. Consequently, the said Law must be regarded as a valid law in Iran.

" The statement of M. Mosadique, Premier of Iran, and the Resolution adopted by the General Assembly of the United Nations on December 22, 1952, both of which are relied on by the respondents, show that the Nationalization Law coincides in its ideas with the recommendations adopted by the General Assembly of the United Nations concerning the exploitation of natural resources, and, moreover, that the Law was enacted for the public welfare of the country. The question presently before the Court concerns only the practical effects of the enforcement of the Law in Iran. The Court, for reasons given below, does not consider that upholding such effect will jeopardize the public policy of Japan. For these reasons the Court comes to the conclusion that it has no power to deny the validity of the Nationalization Law. . . .

" The applicants contend that the Nationalization Law is invalid because it violates the terms of paragraph 3 of Article 21 of the Concession Agreement. It is there clearly stipulated that the Iranian Government will not unilaterally annul the Agreement or expropriate the right and interest of the applicants. However, as stated above, since the Concession Agreement is in its substance a private agreement (an agreement governed by municipal law—not a treaty), the applicants' right and interest thereunder can be expropriated by the Nationalization Law which is a municipal Law of Iran, and the validity of the Nationalization Law cannot be affected by the fact that Iran may be guilty of a breach of contract or possibly of a tort.

"The applicants further contend that the Court ought not to treat the Nationalization Law as valid because the Government of Iran has not fulfilled its obligation under the Concession Agreement to refer the matter to arbitration. The Court considers that such breach of obligation does not affect the validity of the Nationalization Law.

"[III. *Confiscatory Nature of the Expropriation.*] The second point relied on by the applicants is that the Nationalization Law is a confiscatory law without compensation. The Court recognizes that the principle that expropriation of foreign rights and interests should be accompanied by just and immediate compensation is a reasonable principle. But, in fact, section 2 of the Nationalization Law, which was enacted by the Iran Parliament following the correct procedure for legislation and which came into force on May 1, 1951, provides that the Government of Iran is authorized to deposit in the Bank Milli (Iran) or in any other bank a sum representing up to 25 per cent. of the normal current revenue from oil, after deduction of working expenses, for the purpose of providing compensation for the expropriation of the applicants' property. Section 3 provides that the Government of Iran shall examine the claim of the applicants under the supervision of a mixed Board and shall pay compensation after obtaining the approval of the two Houses of Parliament. All of these provisions clearly indicate that the applicants can claim compensation. Evidence has been adduced by the respondents to show that the Iranian Government has already opened a deposit account with the Bank Milli, and has admitted that it is under an obligation to pay just compensation; further, it has expressed willingness to enter into negotiations concerning compensation. The Court observes that in the Nationalization Law no amount, manner or time of payment of compensation is laid down, and there is no evidence that any compensation has actually been paid. Therefore, if the principle above mentioned is applied strictly, the conclusion will be that there has been no immediate compensation in this case. However, the vastness of the rights and interests expropriated, the complexity and diversity of the interests involved, the extreme difficulty of the final assessment of compensation and the difficulty of prompt payment in the present case are unprecedented. In a special case like this, where disputes as to what is the fair amount of compensation are likely to arise, it would be unreasonable to expect immediate payment. The appropriate means for final settlement will be either direct negotiations between the applicants and the Iranian Government or diplomatic negotiations between the United Kingdom Government and the Iranian Government, or possibly through the International Court of Justice or another body agreed upon between the parties. As to the question whether the Iranian Government have provided for compensation, the Court considers that the definite expression of intention to pay, mentioned above, combined with such a concrete preparation for payment as the opening of an account at a bank for the purpose of depositing money for compensation, should be regarded as compensation for expropriation.

" The applicants' evidence shows that the negotiations between the United Kingdom Government and the Iranian Government concerning compensation are at a standstill. But such circumstances do not make the above provisions for compensation worthless. The applicants point out that these provisions make the payment of compensation voluntary; but that after all is a matter of form: it cannot be treated as an argument which goes to the core of the problem of the existence or non-existence of compensation. . . . In conclusion, the Court, holding the view that compensation for the expropriation of the applicants' rights and interests has been provided for, rejects the applicants' claim that the Nationalization Law is invalid because it is a confiscation law which does not provide for compensation.

" [IV. *National Constitution and Recognition of Acts of Foreign Governments Contrary to International Law.*]—The applicants contend that, in view of the fact that no compensation exists in this case, if the courts of Japan allow the Nationalization Law to take effect in Japan that will amount to enforcing a foreign law in violation of Article 29 of the Constitutional Law of Japan which guarantees the inviolability of property rights, and consequently a foreign law which is contrary to the public policy of this country. To permit such a foreign law to have effect would infringe the provisions of Article 30 of the Hōrei.[1]

" The Court, as we have stated, does not agree with the applicants' contention that the Nationalization Law provides for confiscation without compensation. Article 29 of the Japanese Constitution, which provides for the inviolability of property rights as part of the law and order of this country, allows expropriation with compensation for the public welfare. The Court does not consider that this Article of our Constitution forbids the Court to recognize the legal effect arising from the application of laws duly enacted in other countries, and, in this particular instance, to recognize the effect of the Nationalization Law which resulted in the loss of applicants' rights and interests. Further, Article 30 of the Hōrei is a provision which governs positions created under private international law, such as an agreement for sale and purchase, which the respondents may make with a third party; it is a provision which has nothing to do with the facts which precede such agreement for sale and purchase, or the legal effects of such facts. Accordingly, the applicants' contention cannot be accepted.

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[1] See *supra*, p. 306, n.2.

" For the reasons given above, the Court recognizes that the applicants have lost all their rights and interests under the Oil Concession Agreement by the Nationalization Law; they therefore cannot have any title to the oil in dispute. The Court therefore rejects the applicants' claim."

The applicants appealed.

Held (by the Higher Court of Tokyo): that the appeal must be dismissed.

" I. *The Nature of and the Law Governing the Concession Agreement.*—The Concession Agreement entered into between the Persian Empire and the Anglo-Persian Oil Company (the former name of the appellant Company) cannot be regarded as an international treaty or an international convention of a nature similar thereto, in view of the fact that one of the contracting parties is not the Government of a State but is a foreign corporation having its principal office in the United Kingdom. The Concession Agreement should properly be regarded as a contract under private law relating to oil extraction rights, between the Government of a State and a foreign corporation. Accordingly, the land over which the appellants exercised their rights under the said Agreement cannot be treated as so-called ' concession land ' under international law, nor can such rights be called a ' concession '. It is proper to recognize that the appellants possessed only a mining right, called an oil extracting right, and incidentally thereto the right to refine and sell under private law. Although the appellants claim that the intention of the parties was that the Concession Agreement was to be governed not by the municipal law of Iran but by the rules of international law, yet such fact does not appear even from the evidence adduced by the appellants. Nevertheless, in view of the fact that Iran is a civilized country having diplomatic relations with various nations of the world, it must, even without express stipulations such as Article 98 of the Japanese Constitution, be held that Iran is obliged faithfully to abide by the established rules of international law. It would appear that Iran is competent to deal with the aforesaid Agreement between Iran and the appellants under her municipal law, but she is also obliged faithfully to observe the rules of international law.

" II. *The Right to Adjudicate on the Validity of Foreign Nationalization Laws. Presumption in favour of Conformity with International*

Law.—Because Iran enacted, as stated above, the Oil Nationalization Law which caused the oil industry in Iran to be nationalized, and purported to nationalize the appellants' rights under the said Agreement with Iran, there has arisen a dispute between the contracting parties as to whether such rights and interests were or were not actually nationalized by Iran. According to evidence submitted by the appellants, the Iranian Government have by the Nationalization Law expropriated the appellants' rights under the said Agreement, subject to the payment of compensation; if this Law is valid the appellants have no rights [in the oil which is the object of this application], and if the Law is invalid the appellants have retained their rights therein. . . .

"(a) There is an established principle of international law that in the event of a violent social reform or revolution in a State, whether or not the property of the nationals of that State is confiscated, property belonging to foreign nationals can only be expropriated with compensation; it cannot be confiscated. Moreover, such compensation must be ' adequate, efficient and immediate compensation '. This has been confirmed by the practice of many States, by precedents, and by the writings of acknowledged authorities.

"(b) As to whether the courts of a third country must recognize the effect of a law which is, as the Naturalization Law was, properly enacted by another State, or whether it is permissible to examine the validity or invalidity of such a law and then possibly refuse to recognize it, the practice of the various States is still divided, and no universally accepted principle of international law that the effect of a foreign law may be adjudged invalid by the courts of a State has yet been established. . . . This Court considers that the Oil Nationalization Law was enacted in Iran's own interests and in accordance with the Resolution of the General Assembly of the United Nations relating to the exploitation of the natural resources of the various countries. Furthermore, as stated in the conclusions, in view of the fact that the Nationalization Law is not a completely confiscatory law, contrary to the rights and interests of foreign nationals, but a law of expropriation subject to payment of compensation, the Court feels bound to hold that it cannot try the validity or invalidity of such a law by examining the compensation and seeing whether or not it is ' adequate, effective and immediate '. If, however, we take the view that we cannot pass on the validity or invalidity of such a law, we do in effect thereby actually recognize the validity of the law. But if the contents of the law contravene public policy and good morals, then, in view of the provisions of Article 30 of the Hōrei, they ought not to be enforced in this country. (This point is dealt with later.) Unless they are contrary to public order, etc., the result mentioned above will be in conformity with the principles of international comity based on the necessity of mutually respecting the sovereignty of, and maintaining friendly relations among, independent sovereigns. It is true that Iran has not yet ratified the Peace Treaty with Japan of September 8, 1951, so that the two countries have not entered into normal diplomatic relations. That fact is well known to this Court. In view, however, of the fact that normal diplomatic relations will be established sooner or later between the two countries, it is proper for our country to act in conformity with the principles of international comity. Accordingly, the appellants' claim that the Nationalization Law is contrary to international law and therefore invalid may be regarded as groundless to the extent that there is no need to deal with further points in dispute.

"As regards the appellants' claim that the Nationalization Law infringes Article 21, § 3, of the Concession Agreement with Iran, we hold as follows: It is clear that one of the clauses of the Agreement provides that Iran cannot annul the said Agreement unilaterally and expropriate the appellants' rights thereunder . . . It appears therefore that the act of expropriating the appellants' rights under the Agreement by the Nationalization Law is an act which violates the said Article 21, § 3. Inasmuch as the Concession Agreement is, as we have found, merely a contract under private law, and since it may be assumed that it was the intention of both of the parties that in case of non-performance of any part of the contract the municipal law of Iran was to be applied, it is not entirely clear to us what will be the effect under Iranian law of the non-fulfilment by one party of his obligations. From the point of view of the character of the Nationalization Law, Iran is liable, at least, to pay compensation to the appellants, and yet it cannot be said that the Oil Nationalization Law itself becomes null and void. It is also not clear whether the principle of compensation for loss or damage under Iranian law is reparation in money or reparation in kind. It is, however, correct to say that when and until compensation is paid, whether in money or in kind, the right to any property expropriated by the Nationalization Law has been expropriated and the ownership thereof has been lost. Accordingly, the appellants' claim in this regard, which is made on the premise of such ownership not being lost, cannot be accepted. Moreover, the appellants contend that the Nationalization Law is illegal, and that, as it involves compensation in kind, the appellants have not yet lost their rights under the Concession Agreement; and as long, however, as the Court cannot pass on the propriety of the enactment of the Nationalization Law, as explained previously, we ought not to enquire whether it is an unlawful act or not, and therefore even without considering such a matter as the fundamental rules of compensation we must reject the appellants' claim in this regard also.

" III. *Nationalization of Expropriated Oil Already Extracted when the Nationalization Law Came into Force.*—It has been proved in evidence that on September 20, 1951, a large quantity of oil was stored in the tanks at Abadan and Bandar Mashur (Iran), which had been extracted by the appellants under the above-mentioned Concession Agreement. Although there may be some doubt whether or not it was the intention of the Nationalization Law to nationalize oils which had been extracted and stored at the date when the Law came into force, little guidance on that point can be obtained from the Nationalization Law itself. The Law provides that 'The Government [of Iran] . . . shall promptly expropriate the property of [the appellants]', and further, in Article 4, that 'All and any oil revenue and oil products shall be the undeniable property of the State of Iran as from the 20th day of March 1951 . . .' On the basis of these provisions, we tend to the opinion that, as the respondents allege, the oil which had already been extracted at that time was caught by the Nationalization Law and was expropriated by the Iranian Government. On the other hand, the appellants apparently admit the fact that the interpretation given to the Law by the Iranian Government was that the oil which had been extracted at that time was expropriated, and the oil was dealt with as such. If that be the case, admitting that there is left some room for argument as to the interpretation of the Nationalization Law and unless the interpretation given to it by the Government of Iran is an impossible interpretation, it would be advisable for us as the court of a third country to show a high regard for the Iranian Government's interpretation, and that from the standpoint of and by reason of international comity, which arises from the necessity for the respect of sovereign power and the maintenance of friendly relations between independent sovereigns. Therefore, the oil which was in the tanks above-mentioned must be regarded as having been expropriated by the Iranian Government.

" IV. *Ownership of the Expropriated Oil.*—It is difficult to decide on the evidence whether the oil which is the subject of the present appeal was part of the oil which had already been extracted at the time when the Nationalization Law came into force, or was part of the oil extracted after the nationalization. However, if the oil in question had already been extracted at the time of the coming into force of the Nationalization Law, then, as already explained, it is part of the property expropriated by Iran under that Law, so that it must be held that in consequence thereof the appellants lost their right to that oil. If, on the other hand, the said oil was extracted after the Law came into force, even if it was produced from the district of which formerly the appellants held a lease, and was refined at one of the refineries which formerly belonged to the appellants, it cannot be regarded as the property of the appellants so long as the Nationalization Law is held to be valid. And in view of the provision of Article 10 of the Japanese Hōrei, which lays down that the acquisition or loss of ownership of movables and immovables shall be determined by the law of the place where the object in question is situated at the time of the occurrence of the fact or facts constituting the cause of such acquisition or loss, it is obvious that the appellants have, as previously explained in detail, lost their right under Iranian municipal law, which is the law of the place governing the oil in question. Accordingly, this Court has no alternative but to hold that the appellants are not entitled to the oil in question.

" The appellants claim that to recognize the effect of the Nationalization Law or to hold that the appellants have lost their rights in the oil in question would infringe the terms of Article 30 of the Hōrei; but, as explained above, the Nationalization Law cannot simply be regarded as a law by which the rights of foreign nationals are confiscated. And the present Court, which has failed to find any established rules of international law governing the matter, has confined itself to taking the attitude that it is impossible to pass on the validity or invalidity of the said Law and has not concluded positively that the Law is valid. This has had indirectly the same effect as if we recognized the Nationalization Law as valid; and that has resulted in our denying the appellants' ownership of the oil in question. We do not, however, think that these matters are contrary to the public policy of this country. Therefore the appellants' arguments in regard to this point also must be rejected."

[Report: Unpublished.]

Aliens—Treatment of—Property of Aliens—Expropriation without Compensation—Expropriation by Iran of Property of Anglo-Iranian Oil Company—Question of Validity of Decree Purporting to Deprive an Alien of his Property—Purported Transfer of Title by Expropriating State—Expropriated Property in Ship in Foreign Port—Jurisdiction of Court of the Port—International Law—Relation to Municipal Law.

ANGLO-IRANIAN OIL CO., LTD. *v.* JAFFRATE AND OTHERS (*THE ROSE MARY*).

Aden, Supreme Court. January 9, 1953.

(Campbell J.)

THE FACTS.—On June 17, 1952, the *Rose Mary*, flying the flag of Honduras, arrived in Aden harbour with a cargo of crude oil which had been loaded at Bundar Mashur in Southern Iran. The Anglo-Iranian Oil Company Limited brought this action in the Supreme Court of the Colony of Aden *in detinue*, claiming delivery up to them of this oil or, alternatively, a declaration that it was their property. The action was brought against Captain Guiseppe Jaffrate, the then master, the Compania de Navegacion Teresita S.A. of Panama City, Panama, the owners, and Bubenberg A.G. of Spiez, Switzerland, the charterers, of the *Rose Mary*.

The plaintiffs claimed the property in, or the immediate right to possession of, the oil by virtue of the Covention between them and the Imperial Government of Persia concluded on April 29, 1933, by which they were granted the exclusive right within the territory of a specified concession to search for and extract petroleum for a period ending on December 31, 1993. The agreement provided, by Article 21, that it should not be altered by legislation and, by Article 22, that in the event of any disputes they were to be referred to arbitration—a procedure which Iran now declined to adopt. The oil in question, the plaintiffs alleged, was produced by plants established by them in the concession in Southern Iran, and this was admitted by all the defendants.

The owners of the *Rose Mary* refused to give possession of the cargo to the plaintiffs on the ground that the title to it was in dispute, but stated that it was loaded against their instructions. The master pleaded that the *Rose Mary* entered Aden harbour under duress, and that, accordingly, the Aden Court had no jurisdiction in the matter. He also claimed that the cargo belonged to the charterers. The charterers also alleged duress, and, alternatively, relied on the Iranian Laws of March and May 1951, which purported to nationalize and expropriate as from May 1, 1951, all property vested in the plaintiffs by the concession of 1933.

Held: that the Company were entitled to the oil, which had remained their property and to which the Government of Iran had acquired no title, since (1) " the Iranian Laws of 1951 were invalid by international law, for, by them, the property of the company was expropriated without any compensation;" and (2) " British courts treated international law as incorporated into their domestic law so far as it was not inconsistent with their own rules (*per* Lord Atkin in *Chung Chi Cheung* v. *Rex* (1939) A.C. 160, 168; 55 T.L.R. 184; [1938] All E.R. 786) ". It was further held that " the principle in *Aksionairnoye Obschestvo A. M. Luther Co.* v. *James Sagor and Co.* [1921] 3 K.B. 532, 37 T.L.R. 777, and *Princess Paley Olga* v. *Weisz* [1929] 1 K.B. 718; 45 T.L.R. 365, that a court would not inquire into the legality of acts done by a foreign government in respect of property situate in that government's territory applied only where the property was that of the government's own subjects; and . . . accordingly, following international law as incorporated in the domestic law of Aden, the court must refuse validity to the Iranian Laws of 1951." Judgment was, therefore, given for the plaintiffs.

The Court said: " In this case the plaintiffs, the Anglo-Iranian Oil Company, Limited, have brought a claim *in detinue* in respect of approximately 700 tons of crude oil at present in the tanker *Rose Mary* lying in Aden harbour. This oil they assert is their property. They ask for an order against the first defendant who is the master, the second defendants the Compania de Navegacion Teresita who are the owners, and the third defendants, Messrs. Bubenberg, who are the charterers of the *Rose Mary*, that they deliver up to them the oil and in the alternative they ask for a declaration that the oil is their property.

" The defences of the three defendants may briefly be summarised as follows:

" The defence of the first defendant is that his ship came into Aden harbour solely as a result of coercion and that this Court has therefore no jurisdiction. Secondly he pleads that he had no authority to hand over the cargo to the plaintiffs. Thirdly he denies that the cargo belongs to the plaintiffs. Lastly he pleads that as the plaintiff company is not registered in Aden it cannot institute a suit here. This last plea appears to be quite untenable, was not supported by argument or authority, and I reject it now.

" The defence of the second defendants, the owners of the ship, is that they have a lien on the cargo of oil in respect of the charter dues and should therefore not be required to hand it over to the plaintiffs.

" The third defendants, the charterers, plead that this Court has no jurisdiction as they claim that the ship is only in Aden harbour as a result of coercion. They deny that the plaintiffs are the owners of the cargo of oil. They deny that any cause of action has arisen in Aden. Lastly, they plead that they should not be ordered to hand over the oil to the plaintiffs as they are *bona fide* purchasers for value.

[I. *Coercion as a Reason for Excluding the Jurisdiction of the Court.*]—" I propose to deal first with the issue of coercion; the facts concerning which I find to be briefly as follows—

" Early in 1952 Count Della Zonca, the Managing Director of an Italian Company known as Ente Petrolifero Italia Medoriente, arranged on behalf of his firm to buy oil from the National Iranian Oil Co. (which had taken over the property and business of the plaintiffs in Persia) and contracted to sell a quantity to Messrs. Bubenberg, a Swiss firm.

" He appears to have had authority to act on behalf of Messrs. Bubenberg almost from the beginning and arranged for Messrs. Bubenberg a time-charter of the tanker *Rose Mary* with Messrs. Cosulich who were acting as agents of the owners. The charter was for the vessel to go to a port in the Persian Gulf, take on a cargo of petroleum products and then to return to Bari. I do not propose to go into the negotiations between Messrs. Cosulich and Count Della Zonca in detail. I am, however, fully satisfied that both parties agreed that the object of the proposed voyage should be kept secret and that the owners were not informed of the details of the voyage. The master, Guiseppe Jaffrate, knew of the object of the voyage, but was told to keep his knowledge to himself. He was given a sealed letter and told to open it at Port Said.

" The ship sailed from Bari on 25th April, 1952. On 1st May, 1952, having arrived at Port Said, Jaffrate sent a letter to his owners saying, 'I beg to inform you that Charterers Bubenberg Co., Ltd., Spiez, have ordered me by letter to proceed to Bundar Mashur in order to load a cargo of crude oil with destination to an Italian Port.'

" The reaction of the owners on receiving this letter was to write to Messrs. Bubenberg on 12th May, 1952, saying that they considered that the proposed voyage was a breach of clause 2 of the charter and warning them not to put into execution the orders given to the Master. Messrs. Cosulich, who up till then appear to have acted in a somewhat equivocal manner as owners' agents, then joined forces with the owners and jointly and severally they issued a stream of letters and radio messages to Jaffrate telling him not to go to Bundar Mashur or Abadan. They told him that the charter was cancelled and to proceed to Kuwait and load another cargo there. He received another stream of messages from Messrs. Bubenberg, E.P.I.M., and Count Della Zonca telling him to carry out his first orders and not to put into Aden. He did in fact go to Bundar Mashur and on 27th May, 1952, he loaded approximately 700 tons of crude oil which it is not disputed was won from the plaintiffs' concession area. He started his return journey a few days later and came into Aden harbour on 17th June, 1952.

" Jaffrate has given evidence and stated that but for coercion he would have passed Aden and gone on to Suez. He says that he was frightened by two matters. The first was the receipt of two radio messages from his owners on 31st May and 5th June, 1952, threatening him with disciplinary action and legal proceedings if he refused to carry out their orders. The second matter was the arrival overhead on both the 16th and the 17th June, of an R.A.F. aeroplane. On the second day the aeroplane circled round him for two hours and he says that he thought he might be bombarded.

" On the afternoon of the 17th June, 1952, and while 40 miles from Aden he was met by the tug *Protector* which had on board Signor Martinelli, the owners' representative. Martinelli came on board the *Rose Mary* and told him to go into Aden. This he did.

" Is this story of Jaffrate as to his state of mind true ? In my view it is not true. With regard to the threats of police or legal action, it must be observed that on the 9th June, 1952, he received a radio message from Messrs. Cosulich saying:

'Following mine fifth instant owner confirms that he has no intention to take steps for your arrest and legal procedure stop he will be pleased you remaining in command of Rose Mary.'

When he was asked in cross-examination what he had to fear after this message he replied:

'I then had no fear of the police or legal proceedings.'

" As to his fear of the aeroplane, it seems to me very unlikely that this really existed. No reasonable man could think it likely that Her Majesty's Government in the year 1952 would try to resolve a commercial dispute by what would be little short of an act of war. But apart from this, it seems to me that the very acts of Jaffrate negative his claim that he came into Aden through fear. It seems much more probable that he had decided to come into Aden as a result of the orders of his owners. He admits that on 1st June, 1952, he radioed his owners ' proceeding to Aden as per your orders ', that on 6th June, 1952, he informed Messrs. Cosulich that he was proceeding to Aden and that on the 13th June he notified his owners that he expected to arrive in Aden on the evening of the 18th June, 1952. Moreover, immediately on arrival in Aden, he replied, in writing, to a questionnaire submitted to him by Martinelli. In the last paragraph he writes:

' I decided to follow the owners' orders only when with Mangarini code on the 2nd June, I asked Ingegner Cosulich for advice, and he answered me to follow strictly the owners' orders.'

" When in cross-examination he was asked to reconcile what he had said in his radio messages with what he was then saying his reply was that he had been writing lies. He said that he had decided to follow the charterers' and not his owners' intructions and had told the latter lies in order to keep them quiet and avoid being confused by contradictory instructions. To explain his reply to the questionnaire he said that at that time his mental condition was not normal.

" To find that he had decided since the beginning of June to follow the owners' instructions seems to be in accordance with the probabilities. In English law there is no doubt whatever that in a time charter the ownership and also the possession of the ship remain in the original owner, through the master and crew, who continue to be his servants. It is unnecessary to give a decision as to what would be the ruling on this point where the law to be followed would be that which is applicable when a ship which is owned by a company registered in Honduras and herself registered in Panama, is chartered by a Swiss Company in Switzerland and sails under an Italian master from an Italian port to load a cargo from Persia.

" But I think there is a presumption that the English rule is universal from the very nature of a time charter. It is consistent with this time charter. It would follow, therefore, that Jaffrate would only be doing the normal and probable thing if he decided to follow the owners' and not the charterers' orders and this is what I think in fact he did.

" For these reasons I find that the plea of coercion fails and does not deprive this court of jurisdiction.

[II. *Title to Expropriated Property. Compensation as a Condition of Acquisition of Title.*]—" We now come to the second main issue in this case: whether or not the plaintiffs prove that this cargo of oil is their property. They say that their title to it is by virtue of a concession granted to them by the Persian Government as the result of an agreement entered into in 1933 and which was due to expire in 1993. By Article 21 of the agreement it was laid down that the concession should not be annulled by the Government and the terms therein contained should not be altered either by general or special legislation in the future, or by administrative measures or any other acts whatever of the executive authorities.

" On the 1st May, 1951, an Oil Nationalisation Law was put into effect by the Persian Government. Although there is evidence that there was in existence another oil concession in Persia which had not produced any oil it is not disputed that the law was passed to nationalise the plaintiff company only.

" The plaintiffs say that this Oil Nationalisation law is contrary to international law as being expropriation without compensation and is really only confiscation. They contend that as this court is bound to administer international law where it is appropriate it should refuse to recognise any act which is contrary to international law. It must be decided, therefore, whether this expropriation was with or without compensation.

" The Articles of the Oil Nationalisation Law which may be said to touch the matter of compensation are Articles 2 and 3. Article 2 reads as follows:

' The Government is bound to dispossess at once the former Anglo-Iranian Oil Company under the supervision of the mixed board. If the Company refuses to hand over at once on the ground of existing claims on the Government, the Government can, by mutual agreement, deposit in the Bank Milli Iran or in any other bank up to 25 per cent. of current revenue from the oil after deduction of exploitation expenses in order to meet the probable claims of the Company.'

" Construed in its grammatical sense it is hopeless to suggest that this is an offer to pay compensation. If it is loosely construed and with every bias in favour of the contention of the defendants I can only find that it consists of no more than a suggestion that at some future time the matter of compensation may be considered and that it gives the Government power to deposit in a Bank a proportion of the future profits of the expropriated business against that contingency. The proportion may apparently vary between 0 per cent. and 25 per cent. of the current revenues.

Article 3 reads as follows—

' The Government is bound to examine the rightful claims of the Government as well as the rightful claims of the Company under the supervision of the mixed board and to submit its suggestions to the two Houses of Parliament in order that the same may be implemented after approval by the two Houses.'

" I cannot see that this is really any advance on the previous Article. It says that a Committee of Senators and Deputies shall go into the question of compensation. But the plaintiffs would have no rights even if the committee found they were entitled to compensation. For the approval of the Houses of Parliament is then necessary. They might approve: but they might not. A fair test to decide whether either of these two Articles gives the plaintiffs any *quid pro quo* for having their business nationalised is to ask whether they would be any worse off if the Articles had been omitted. The answer is clearly no. The plaintiffs have to rely for compensation in either case solely on the bounty of the expropriator.

" Nor is the position affected by the fact that some months after nationalisation had been carried out Dr. Mossadeq, the Persian Prime Minister, made another offer regarding compensation in a letter to Mr. Churchill dated the 24th September, 1952. By this time the plaintiffs had been expropriated without any compensation. It it were necessary to evaluate this new offer to see whether it can amount to what is ordinarily understood by the word ' compensation ', the answer must be in the negative. It first insists on an advance payment of £49,000,000 by the expropriatee to the expropriator. Then it sets out that the arbitration shall take into account (a) a calculation of any unpaid taxes owed by the plaintiffs, and (b) a calculation of what extra royalties the plaintiffs would have paid if an agreement (known as the Gass-Golshoyan Agreement) which the Persian Houses of Parliament had refused to ratify, had in fact been ratified.

" The arbitration was then excluded from taking into consideration any loss which the company would suffer after the date of nationalisation by reason of having its concession shortened from 60 years to 18 years. It could only award compensation for loss of the actual property expropriated.

" In discussing what is meant by the word ' compensation ' in relation to international law it has sometimes been said that it must be ' adequate, effective and prompt '. The question of adequacy may often be difficult for a court to decide and no doubt this has caused and will cause considerable trouble in other cases in dealing with the extraterritorial effect of foreign nationalisation. But here I can only find to be true the plaintiffs' contention that expropriation has taken place without any compensation and that this is confiscation.

" That the courts in England will do nothing to invalidate an act of confiscation by a sovereign State of the property of its nationals is not disputed by the plaintiffs. The cases of *Luther* v. *Sagor*, [1921] 3 K.B. 532, and *Paley* v. *Weisz*, [1929] 1 K.B. 718, are authority for the proposition. What has to be decided is whether the reverse is true when the property confiscated is that of a non-national.

" The plaintiffs' contention can be based on two grounds. In the first place, that no State can be expected to give effect within its territorial jurisdiction to a foreign law that is contrary to its own public policy or essential principles of morality. Secondly, that a foreign law that is contrary to international law or in flagrant violation of international comity need not be regarded.

[III. *International Law as Part of Municipal Law.*]—" International law is the settled practice of nations. As was said by Lord Atkin in the Privy Council in *Chung Chi Cheung* v. *Rex*, [1939] A.C. at p. 168 [*Annual Digest*, 1938–1940, Case No. 87]:

> ' The courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.'

This settled practice can be ascertained from decided cases and from the writings of jurists, and to these I now turn.

" The first English case cited on behalf of the plaintiffs is *Wolff* v. *Oxholm*, 6. M & S. p. 1177. This was tried in 1817 and it was held that payment to the Danish Government of a debt due to an Englishman, by virtue of a Danish order of sequestration, did not operate to discharge the Danish debtor from the claim of the English creditor. In the concluding paragraph of his judgment Lord Ellenborough says:

> ' Considering, therefore, that the right of confiscating debts contended for on the authority of these citations from Vattel is not recognised by Grotius, and is impugned by Pufendorf and others, that such confiscation was not general at any period of time, and that no instance of it, except the ordinance in question, is to be found for something more than a century, we think our judgment would be pregnant of mischief to future times, if we did not declare, that in our opinion this ordinance, and the payment to the commissioners appointed under it, do not furnish a defence to the present action; and if they cannot do this of themselves, neither can they do so by the aid of the proceedings of the Danish Court. The parties went into that court expecting justice, according to the then existing laws of the country, and are not bound by the quashing of their suit in consequence of a subsequent ordinance, *not conformable to the usage of nations*, and which, therefore, they could not expect, nor are they or we bound to regard.'

" The next case is *Kaufman* v. *Gerson*, [1904] 1 K.B. 591. A domiciled Frenchman coerced a domiciled Frenchwoman into signing a contract in France by threatening that if she refused to make the agreement he would prosecute her husband for a crime of which he was accused. The contract was valid by French law, but nevertheless an action for its breach was dismissed by the Court of Appeal. Romer L.J. held that ' to enforce a contract so procured would be to contravene what by the law of this country is deemed an essential moral interest.'

" The third case is *In re Fried. Krupp A.G.*, [1917] 11 Ch. 188. Here a German ordinance of 30th September, 1914, forbade transmission of funds to Great Britain and Ireland or British Colonies or foreign possessions, and provided that the date for satisfaction of claims relating to property in favour of persons or bodies situated in such areas was deemed postponed till further notice. It also enacted that 'No interest can be claimed in respect of the period during which the postponement continues.' The Court found that it was the ordinary rule of German law that such a debt would carry interest at 5 per cent. and refused to make effective the ordinance denying such interest. Mr. Justice Younger says at p. 193:

> 'In that state of things it appears to me impossible that any court in this country can recognize a German ordinance of this description, and there is, I think a choice of grounds on which refusal to do so can properly be based. It may, I think, first of all be said that such ordinance as this is no part of the general German law, by which the parties to this contract alone agreed to be bound. And even if such an ordinance must be treated as part of that law, it may, I think, properly be held that no such essentially one-sided development of the system could have been within the contemplation of either party to the contract at the time they entered into it and agreed that their rights thereunder were to be regulated by German law. But, further, this ordinance, with its marked bias in favour of German nationals as against British subjects, can, in my opinion, create in this country no disability upon a person against whom its provisions are directed, and the language of Lord Ellenborough in *Wolff* v. *Oxholm* may, with the necessary modifications, justly be applied to it, so far as it operates to extinguish all German liability for convential interest, as being one which is *not conformable to the usage of nations*, and which therefore, Messrs. Wild could not expect, and which neither they nor we are bound to regard. Whatever ground of decision is chosen, it is I think, clear that in this court Messrs. Wild's debt carries interest unaffected by the ordinance, and that accordingly this summons must be dismissed.'

[IV. *The Question of Compensation before Municipal and International Courts.*]—" I have been referred to a number of foreign decisions. In *Société Potasas Ibericus* v. *Nathan Bloch* (*Annual Digest* of *Public International Law Cases*, 1938–1940, p. 150) the French Court of Cassation held that decrees of expropriation by the Government of Catalonia were invalid in France on the ground that, as no just compensation had been provided for, they were against French Public Policy. In *U.R.S.S.* v. *Société La Ropit* (*Annual Digest of Public International Law Cases*, 1927–1928, p. 67) the same Court held that

> 'although the principle that the courts of a State faced with a juridical situation governed by foreign legislation should apply the foreign law must be admitted, this rule is only obligatory in so far as the application of the foreign law and respect for the rights acquired thereby are not incompatible with those principles and provisions of their national law which are held essential for *ordre publique*.'

The Court then proceeded to disallow the intervention of the Russian Government to get possession of merchant ships which had been nationalised and were berthed at Marseilles.

" In relying on French cases, however, it must be borne in mind that the domestic law of France is very explicit regarding the right of private ownership. In Article 545 of the Civil Code it is laid down that:

' No one in France can be forced to give up his property except in the public interest and in return for a fair and prepaid compensation.'

" The decisions in the two cases I have just mentioned actually referred to this section. But although in Aden there is no statutory enactment so far as I know similar to this section, it is nevertheless part of the common law. The cases therefore have some authority.

" In Poland the Supreme Court in *Siuta* v. *Guzkowski* (*Annual Digest of Public International Law Cases*, 1919–1922, p. 480) refused validity to a requisition by Ukrainian troops in Poland of horses which they sold to local inhabitants. Its decision was based mainly on Article 52 of the Hague Rules, which forbids requisitions except for the needs of the occupying forces. Nevertheless, it is applicable here inasmuch as the principle was laid down that whether or not the Hague Rules are binding on the parties (and it would seem that they were not binding on the Ukrainians who were not recognized as belligerents) the Polish courts regard confiscation such as this contrary to the ' cardinal principle of international custom '. And if an act was contrary to international custom they would grant it no validity in Poland.

" In Germany the Provincial Court of Kassel and the District Court of Waiblingen, dealing in 1947 and 1948 with cases relating to the sequestration of property of Germans *qua* Germans, living in Czechoslovakia, held that such sequestration was contrary to international law and refused to recognise it. Where such property came into their jurisdiction they ordered its return to its owners. The cases are to be found in *New Juridical Weekly Review*, 1947, p. 628, and *Monthly Review of German Law*, 1949, p. 163, respectively. The Provincial Court of Hildersheim, in a similar case to be found in the *South German Lawyers' Review*, 1948, p. 143, came to a different conclusion. But they gave no reasons for their decision.

" In Italy the Tribunal of Florence, in *Lucchesi* v. *Malfatti* (II *Foro Italiano*, vol. 69 (1944–1946), p. 985 [*Annual Digest*, 1946, p. 382]) had to decide the subsequent ownership of a motor car which had been requisitioned by the Germans but not for the requirements of the occupying troops. They had seized it from the plaintiff and given it to the defendant on the ground that he was an invalid of the Great War. The Tribunal found that the requisition was unlawful and ordered the return of the car to its former owner. This case, like others previously mentioned, arises out of events which took place in time of war and partly depends on the law of war. But it would seem also applicable to peace time. For if a court is willing to hold that a seizure is illegal in time of war *a fortiori* it would be unwilling to recognise the same in time of peace.

" I now come to the *Norwegian Ships* case, 1922 [*A.J.*, vol. 17 (1923), p. 362]: The Government of the United States of America had, in 1917, requisitioned certain Norwegian ships. The two Governments submitted the question of compensation to an arbitration tribunal under the auspices of the Permanent Court of Arbitration at The Hague. Although compensation was the only issue there are several observations in the award which seem relevant to the present case. At page 67 [of the Award] it is said:

' The fifth amendment of the Constitution of the United States provides: " No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

' It is common ground that in this respect the public law of the Parties is in complete accord with the international public law of all civilised countries.'

At page 69:

' Whether the action of the United States was lawful or not, just compensation is due to the claimants under the municipal law of the United States, as well as the international law, based upon the respect for private property '.

In deciding what is meant by the word ' compensation ' in international law the Tribunal said at page 73:

' Just compensation implies a complete restitution of the *status quo ante*, based not upon future gains of the United States or other powers, but upon the loss of profits of the Norwegian owners as compared with other owners of similar property '.

Lastly at page 74 it is laid down that:

' International law and justice are based upon the principle of equality between States. No state can exercise towards the citizens of another civilized State the " power of eminent domain " without respecting the property of such foreign citizens, or without paying just compensation as determined by an impartial tribunal if necessary '.

" In the case of the *De Sabla Claim* (*Annual Digest of Public International Law Cases*, 1933–1934, p. 241), the specially appointed Claims Commission enquired into the expropriation by the Government of Panama of land belonging to a national of the United States of America. In its judgment the Commission stated:

' The Commission concludes that the adjudications and the licences granted by the authorities on Bernadino constituted wrongful acts for which the Government is responsible internationally. It is axiomatic that acts of a government in depriving an alien of his property without compensation impose international responsibility.'

" In 1938 the Government of Mexico nationalised its oil. A long correspondence then took place between the Government of Mexico and Mr. Cordell Hull the Secretary of State of the United States. In many communications the latter contended that confiscation of the property of aliens is contrary to, and will not be recognised by, international law. He argued that confiscation does not cease to be so because there may be the express desire to pay at some time in the future. The plaintiffs invoke this correspondence in aid. They say that it is not only the opinion of the writer but, as he was then Secretary of State, it is a statement of the opinion, and this is an expression of what would be the practice, of the Government of the United States. This may well be, but it is an opinion set out when arguing a brief and as such I think it cannot have the weight which should be given to a judicial opinion. It has not got that salutary check upon the writer of the overhanging shadow of a Court of Appeal. How I think the plaintiffs are entitled to invoke the dispute in their aid is by reason of the fact that throughout the argument the Mexican Government does not appear to have denied the main premise of their adversary's argument. They refer to the blood of Mexico's sons shed in the revolutionary struggle and assert that their acts were inspired by legitimate causes and the aspirations of social justice. But they do not deny the principles of compensation.

"The defendants have cited *Paley* v. *Weisz*[1] and *Luther* v. *Sagor*[2] as being in their favour. The first of these does no more than lay down the principle, as enunciated by Russell L.J. at p. 736 of the report, that:

> 'This court will not enquire into the legality of acts done by a foreign government against its own subjects in respect of property situate in its own territory'.

It said nothing regarding property of those not its own subjects.

"The second case, *Luther* v. *Sagor*, also concerned confiscation of property belonging to subjects of the confiscating Government. It was also held that the confiscation was valid and would be upheld by the English court. The *dicta* in the judgments on which the defendants seek to rely are chiefly those of Scrutton L.J. At p. 556 of the report he says:

> 'Should there be any government which appropriates other people's property without compensation, the remedy appears to be to refuse to recognise it as a sovereign state'.

At page 558, he says:

> 'But it appears a serious breach of international comity, if a state is recognised as a sovereign independent state, to postulate that its legislation is contrary to essential principles of justice and morality.'

"The court was considering the effect of the conduct of a sovereign State in regard to its subjects. If Scrutton L.J. had been specifically considering such conduct in regard to aliens, a far wider question of international law, I feel no confidence that he would have expressed the same opinion. His remarks were a good deal wider than necessary for the decision of the case.

[[1] *Annual Digest*, 1929–1930, Case No. 60.]

[[2] *Annual Digest*, 1919–1922, Case No. 26.]

" On the whole I think that the relevance to this case of a great part of the judgment in *Luther* v. *Sagor* is more apparent than real and that the case is in no way decisive here.

" The case of *Santos* v. *Illidge*, (1860) 8 C.B. (N.S.) 861, might also appear at first to favour the argument of the defendants. Here the non-delivery of slaves in Brazil under a contract made there which was lawful according to Brazilian law was held actionable in England though the sale would have been criminal in England. The slaves were acquired by the defendants in Brazil after the passing of the Slave Trade Act, 1824, but before the passing of the Slave Trade Act, 1843. It would seem that the reason why the court did not refuse to entertain the claim was that no statute prohibited the holding of slaves in Brazil even though the purchasing of them might be a felony in a British subject. That well known case, known as *Somersett's case*, (1772) 20 State Trials, where an escaped slave successfully sued out a writ of *habeas corpus* on the ground that although slavery may be recognised and lawful in the Colonies it was not allowed and approved of by the law of England was, therefore, not overruled.

" British courts are inclined towards resting international law on practice and precedent rather than on the opinions of speculative writers however unanimous or eminent they may be. Nevertheless I have examined the opinions of jurists on international law in such of their writings as are available here. The conclusion I arrive at is that Dicey, Oppenheim, Cheshire, Fachiri and Hackworth endorse the view that expropriation without compensation is contrary to international law. I can find no opinions to the contrary though the defendants have referred me to Martin Wolff.

" For the reasons set out above I am satisfied that following international law as incorporated in the domestic law of Aden, this Court must refuse validity to the Persian Oil Nationalisation Law in so far as it relates to nationalised property of the plaintiffs which may come within its territorial jurisdiction. I find the oil in dispute to be still the property of the plaintiffs. . . .

" I therefore find that the plaintiffs are entitled to succeed in this action and that the cargo of oil must be returned to them. A decree will issue against all three defendants to this effect as each has or had a measure of control over the cargo."

[Report: [1953] 1 W.L.R. 246.]

Aliens—Respect for Property of—Expropriation—Protection under Treaty of Lausanne, 1923—Abrogation by Subsequent Municipal Law.

COMPULSORY ACQUISITION (GREECE) CASE.

Greece, Conseil d'État. 1953.

THE FACTS.—This was an appeal against an order of the Minister of Agriculture for the compulsory acquisition of certain rural property for the settlement of farmers who had lost their land. The appellants, the owners of the property, were Turkish nationals domiciled at Constantinople. They sought the cancellation of the order on the ground that it contravened Article 29 of the Treaty of Ankara (ratified by Law No. 4793 of 1930) and Articles 65 and 66 of the Peace Treaty of Lausanne, 1923[1].

Held: that the appeal must fail. The order was good notwithstanding the Turkish nationality of the owners.

The Court said: " The appellants claim that compulsory acquisition under Article 104 of the Constitution and Decree Law No. 2195 of 1952 cannot be applied to the rural property in question because the latter belongs to non-exchangeable Muslims[2]. Such property [it is contended] is subject to treaties concluded between Greece and Turkey, which protected it from compulsory acquisition. That claim must be rejected as bad in law. It is quite clear from the general nature of the provisions of Article 104 of the Constitution and Decree Law 2185 of 1952 that expropriation instituted in derogation of Article 17 of the Constitution concerns all rural property situate in Greece, irrespective of the nationality of the owner, so long as the conditions laid down in the said enactments are complied with, and that none of the grounds of exemption therein specified in restrictive terms apply to the property in question. Among those grounds no distinction is made in favour of foreigners or their property. The legislator having thus clearly expressed his intention in favour of uniform application of the law to everyone, irrespective of nationality, it follows that Decree Law of 1952 will prevail over all pre-existing enactments, whether general or particular, as also over the prior treaties which had been invoked. Moreover, the provisions of Article 5 of the Final Protocol of the Treaty of Athens of December 1, 1926, ' on the modalities of application of certain provisions of the Treaty of Peace of Lausanne and of Declaration No. IX annexed thereto ' (ratified by Law No. 3372 of 1927), under the terms of which ' the property of a Greek *ressortissant* situate in Turkey may be expropriated only for a public utility purpose recognized by the law and after payment of proper compensation ', were abrogated by Article 29 of the subsequent Treaty of Ankara (Law 4793 of 1930), the object of which, as appears from its preamble, was to settle definitively questions which arose out of the application of the earlier treaties, declarations, and other acts.

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[1] These last two Articles relate to the restoration of property, rights and interests belonging to Allied and Turkish nationals respectively in Turkish or ex-Turkish territories.

[2] See the Convention concerning the Exchange of Greek and Turkish Populations, signed at Lausanne on January 30, 1923:

" Article 2. The following persons shall not be included in the exchange provided for in Article 1: . . . (*b*) The moslem inhabitants of Western Thrace . . ."

" Article 16. . . . No obstacle shall be placed in the way of the inhabitants excepted from the exchange under Article 2 exercising freely their right to . . . enjoy to the full their . . . rights of property in Turkey and in Greece . . ."

Under Article 29, 'Subject to the provisions of the ordinary law and to Article 25 of the present Treaty, no seizure or restrictive measure whatsoever shall in future be imposed on property the ownership of which shall not have been transferred to one of the two Governments under the present Treaty, and owners of the said property shall be free to possess, dispose of and administer the same at their pleasure.' The object of Article 5 of the Final Protocol of the Treaty of Athens, which repeats the constitutional principle of the protection of ownership, is to protect ownership in such a way as to put an end to inequality of treatment by reason of the nationality of the owner, with regard to the nationals of each of the two contracting States. Article 29 of the Treaty of Ankara, quoted above, settles the same question *ab initio* and in a different manner—subject to Article 25 of the same Treaty, which forbade for the future the taking of possession, putting under sequestration, or seizure, of other property without the approval of the Mixed Commission, and subject to the provisions of the ordinary law. The latter evidently included the provisions of the local law which applied to property in general, situate in either of the two contracting States, irrespective of the nationality of the owners."

[*Report*: *Revue Hellénique de Droit International*, 7 (1953), p. 390.]

Aliens—Respect for Property of—Nationalization of Bank—Effect on Property Right of Alien Depositor.

See p. 215 (*Tabar Claim* (No. 2)).

III.—Expulsion of Aliens

i.—Right of Expulsion

Aliens—Expulsion of—Denial of Asylum—Right of Alien to Due Process of Law—Discretionary Powers of Attorney-General—The Law of the United States of America.

UNITED STATES *ex rel.* DOLENZ *v.* SHAUGHNESSY.

United States, Court of Appeals, Second Circuit. August 11, 1953.

THE FACTS.—The Commissioner of Immigration and Naturalization issued an order for the deportation of Dolenz to Yugoslavia, on the grounds that he was in the United States unlawfully and that he had been a member of the Communist Party. Dolenz applied for suspension of this order pursuant to section 20 of the Act of February 5, 1917, 39 Stat. 890, as amended (then in effect), which provided:

> "No alien shall be deported under any provisions of this chapter to any country in which the Attorney General shall find that such alien would be subjected to physical persecution."

Dolenz alleged that he would be subjected to such persecution in Yugoslavia if he were to be deported.

The Commissioner of Immigration, acting on behalf of the Attorney-General, found that Dolenz would not be subjected to persecution in Yugoslavia. The alien thereupon petitioned for a writ of habeas corpus. The United States District Court for the Southern District of New York dismissed the writ on the ground that the Attorney-General had not abused his discretion in refusing to suspend deportation of the alien (107 F. Supp. 611 S.D. N.Y. 1952). On appeal, the order of the District Court was affirmed by the United States Court of Appeals for the Second Circuit (200 F.2d 288 (2d Cir. 1952); *certiorari* denied; 345 U.S. 928, 73 Sup. Ct. 780, 97 L.Ed. 1358 (1953)). Dolenz then moved for a rehearing, or, alternatively, that a new writ of habeas corpus be issued. He alleged (a) that the refusal to suspend deportation was based on information outside the record which had not been disclosed to him, and that such a procedure was a denial of due process of law, and (b) that no inquiry had been addressed to Yugoslavia concerning his treatment by that country. The District Court dismissed the petition.

On appeal,

Held: that the order of the District Court must be affirmed. The withholding of deportation in cases where the alien fears persecution rests wholly in the discretion of the Attorney-General or his delegate. The use of confidential information which could not be disclosed for security reasons did not violate the petitioner's right to procedural due process.

The Court said, in part: ". . . The appellant complains that he was denied procedural due process because in deciding that he would not be subjected to physical persecution if deported to Yugoslavia the Commissioner resorted to matters outside the record and used confidential information never disclosed to the appellant. He supports this assertion by quoting a statement made in March 1953 by Robert L. Stern, Acting Solicitor-General, regarding this very case.[1] It would seem that this statement must have been before the Supreme Court when it denied the appellant's petition for certiorari. However that may be, we think it clear that use by the Commissioner of confidential information undisclosed to the appellant would not be in violation of procedural due process. The appellant contends, without contradiction by the respondent, that whether the new evidence was such as to require issuance of a writ of habeas corpus must be determined by the statute in force in Arpil 1953, when the relator made his motion. The statute then in force is 8 U.S.C.A. § 1253(h). It reads as follows:

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[1] The quoted statement reads as follows:

"We are advised by the Commissioner of Immigration and Naturalization that such transcripts, exhibits and the reports of investigators are carefully examined by persons assigned to this work in the Immigration and Naturalization Service, who also compare and consider any additional information adduced by or concerning the alien in the record of the deportation hearing and any additional information available or, when necessary, obtained from other governmental sources. Obviously, certain of the information and its sources cannot be disclosed. Hence, the undesirability, as well as lack of necessity, of adducing of evidence by the Government at the inquiry."

> 'The Attorney General is authorized to withhold deportation of any alien within the United States to any country in which in his opinion the alien would be subject to physical persecution and for such period of time as he deems to be necessary for such reason.'

That section modified the language of the former statute in a manner which shows clearly, we think, that the withholding of deportation in cases where the alien fears persecution rests wholly in the administrative judgment and 'opinion' of the Attorney-General or his delegate. The courts may not substitute their judgment for his. Doubtless a court might intervene to stay deportation, if the Attorney-General or his delegate should deny the alien any opportunity to present evidence on the subject of persecution or should refuse to consider the evidence presented by the alien.[1] But we see nothing in the statute to suggest that the courts may insist that the Attorney-General's opinion be based solely on evidence which is disclosed to the alien.[2] In his official capacity the Attorney-General has access to confidential information derived from the State Department or other intelligence services of the Government which may be of great assistance to him in making his decision as to the likelihood of physical persecution of the alien in the country to which he is to be deported. We believe Congress intended the Attorney-General to use whatever information he has. To preclude his use of confidential information unless he is willing to disclose it to the alien would defeat this purpose. Moreover, the very nature of the decision he must make concerning what the foreign country is likely to do is a political issue into which the courts should not intrude. As was said in *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 341, 436, 92 L.Ed. 568: 'But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial.'

"The second item of alleged new evidence is the claim that it was general practice of the United States to make diplomatic inquiry of the foreign government as to persecution of the alien if deported. That this was the general practice of the Government was categorically denied. In a single instance a subordinate official made such an inquiry without so far as appears any authorization to do so. Whether a diplomatic inquiry should be addressed to a foreign government is a purely discretionary matter, and in the absence of proof of a general practice, the contention that the Attorney-General acted arbitrarily in not making such an inquiry of Yugoslavia merits no discussion . . ."

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[1] See *United States ex rel. Harisiades* v. *Shaughnessy*, 2 Cir., 187 F.2d 137, 142, affirmed 342 U.S. 580, 72 S.Ct. 512, 96 L.Ed. 586 (*International Law Reports*, 1952, Case No. 69.]

[2] [Footnote omitted.]

[Report: 106 F.2d 392.]

NOTE.—(1) The decision in the first habeas corpus proceeding in the *Dolenz* Case (200 F.2d 288 (2d Cir. 1952)), is noted in *Cornell Law Quarterly*, 38 (1953), p. 591.

(2) The same conclusion on similar facts was reached in *United States ex rel. Watts* v. *Shaughnessy*, 206 F.2d 616 (2d Cir. 1953) (*International Law Reports*, 1952, Case No. 71).

(3) *Expulsion of Aliens for Commission of Crimes Involving Moral Turpitude.*—Expulsion of aliens on the basis of the commission of crimes involving moral turpitude was upheld in *United States ex rel. Carrollo* v. *Bode*, 204 F.2d 220 (8th Cir. 1953), *certiorari* denied, 346 U.S. 857, 98 L.Ed. 370, 74 Sup.Ct. 73 (1953) (conspiring to defraud the United States), and in *United States ex rel. Abbenante* v. *Butterfield*, 112 F. Supp. 324 (E.D.Mich. 1953), affirmed without opinion, 212 F.2d 794 (6th Cir. 1954) (forging prescription for narcotics). In *United States ex rel. Giglio* v. *Neelly*, 208 F.2d 337 (7th Cir. 1953), the crime of counterfeiting pennies and nickels was held not to involve moral turpitude. In *Gonzales-Martinez* v. *Landon et Al.*, 203 F.2d 196 (9th Cir. 1953), *certiorari* denied, 345 U.S. 998, 73 Sup. Ct. 1140, 97 L.Ed. 1405 (1953), the Court held that the Attorney-General had no authority to suspend a deportation order based on the commission of bigamy, a crime involving turpitude. In *United States ex rel. Pappageanakis* v. *Shaughnessy*, 114 F.Supp. 371 (S.D.N.Y. 1953), a deportation order was sustained where the crime of forgery, conceded to involve moral turpitude, was committed more than five years prior to the alien's last entry into the United States and deportation proceedings were commenced more than five years after entry.

(4) *Right of Expulsion of Aliens for Membership in the Communist Party.*—Expulsion of an alien on the ground of membership in the Communist Party was held not to violate the United States Constitution in *Galvan* v. *Press*, 201 F.2d 302 (9th Cir. 1953), affirmed, 347 U.S. 522, 74 Sup. Ct. 737, 98 L.Ed. 911 (1954), and *Garcia* v. *Landon*, 207 F.2d 693 (9th Cir. 1953). An alien who had lived a law-abiding life since being lawfully admitted to permanent residence in the United States in 1948 could not be expelled on the ground of membership in the Communist Party in Tunisia from 1937 to 1939, although he could have been excluded on that ground: *Berrebi* v. *Crossman*, 208 F.2d 498 (5th Cir. 1953).

Aliens—Expulsion of—" Renvoi "—" Competent Authority "—Reasons for " Renvoi ".

MANSOURI *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'Etat. May 22, 1953.

THE FACTS.—The complainant, an alien, was, on April 20, 1951, notified of a " mesure de renvoi " requiring him to leave Belgian territory. The measure issued from an administrative officer of the

Department of Public Safety. The reason for it was stated to be that the complainant's presence in the country was considered harmful to its safety. The complainant now asked for the annulment of the measure, on the grounds, first, that only the Minister of Justice was competent to compel aliens to leave the country, and, secondly, that the measure was not in fact justified. It was contended on behalf of the Minister of Justice that the administrative officer concerned acted in pursuance of a customary tacit delegation from the Minister, and that the measure was justified by the complainant's criminal record, in particular a conviction at Mons for corruption of an official.

Held: that the complaint must be rejected. Authority to order an alien not in possession of a residence permit to leave the country (*renvoi*) could be delegated to an administrative authority by the Minister of Justice. The complainant's criminal record could justify a decision to order him to leave the country on the ground that his continued presence was harmful to its safety.

The Court said: " During his stay in Belgium the complainant only had temporary residence permits, which were renewed every six months by the administrative authorities of the commune in which he might find himself. His permit finally expired on March 21, 1951. On April 16, when the measure complained of was decided on, and on April 20 when the complainant was notified of it, the complainant was not in possession of any permit. The measure taken is thus not tantamount to the revocation of an authorization, but is simply a refusal to renew a temporary residence permit, together with an order to leave the country.

" A temporary residence permit is not required to be granted by the Minister of Justice himself. While the Law of September 28, 1939, makes the Minister of Justice responsible for residence permits, it permits him to lay down exceptions to that rule. A ministerial order of October 13, 1939, authorizes the granting of residence permits for a period not exceeding six months by the administrative authorities of individual communes, which have, in this connection, general supervisory powers under the authority of the Minister. It follows that the decision concerning the grant, or the refusal, of a temporary residence permit is not reserved for the Minister, but may be taken by administrative authorities or officials exercising delegated powers. An order to leave the country is the normal consequence of a refusal to renew a residence permit. Accordingly, the decision complained of was taken by a competent authority.

". . . In the light of the criminal record of the complainant the administrative authorities were entitled to decide that his temporary residence permit should not be renewed, and that he should be required to leave the country. In taking that decision, and justifying it on the ground that the presence of the complainant was harmful to the safety of the country, they remained within the limits of their powers."

[Report: *Pasicrisie belge,* 1954, IV, p. 117.]

Aliens—Expulsion of—Reasons for Expulsion—Judicial Review—Privileged Aliens—Alien Married to a National.

CAZIER *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. *July* 13, 1953.

THE FACTS.—The complainant, an alien married to a Belgian national, was on August 23, 1950, notified of a ministerial order, dated August 4, 1950, for his expulsion from Belgian territory. The order stated that the presence of the complainant on Belgian territory was considered harmful to the safety of the country. The complainant now asked for the annulment of the order, on the grounds, first, that the order did not properly set forth the reasons for the expulsion, but merely used a stereotyped formula, and, secondly, that the complainant, as an alien married to a Belgian national, could not be expelled (Article 2 of a Law of February 12, 1897). By order of July 4, 1952, the Conseil d'État ordered the submission of all documents contained in the administrative file of the case which would justify the expulsion. In pursuance of that order the Minister of Justice transmitted a note alleging that the complainant had taken part in a communist procession on May Day; that he had sold " The Red Flag " in the streets of Brussels; and that he had participated in election propaganda for the Communist Party. For the rest, the note stated that " the submission of other documents of the file would reveal information which cannot be rendered public without grave danger for the country ". The complainant admitted the first of the three allegations.

Held: that the expulsion order must be annulled. While the Conseil d'État could not review the judgment of the Minister of Justice that an alien's presence is harmful to the safety of the country it must set aside, as an abuse of powers, a decision taken in the absence of any circumstance capable of justifying it.

The Court said: " Under the Law of September 28, 1939, the Administration is not bound to state in the expulsion order the facts which led it to resort to that measure. It is sufficient for it to state in the order which of the exceptional circumstances provided for by the Law is relied upon. This formality was complied with by stating in the order that " the presence of the alien in the country is considered to be harmful to the safety of the country '.

" The Conseil d'État is not empowered to judge whether the Minister of Justice was right in considering the presence of a particular alien to be harmful for the safety of the country. At the same time, there would be abuse of powers if the expulsion were decided upon in the absence of any circumstances capable of justifying it, *i.e.*, on the basis of non-existent facts or on the basis of facts which cannot be considered in law as valid reasons for expulsion . . .

" May 1 is a public holiday, traditionally celebrated with parades. There is no indication that there was any feature of the parade in which the complainant took part which would have given it a subversive character . . . The sale [by the complainant] of ' The Red Flag ' in the streets of Brussels—which is not a clandestine activity—is not admitted, nor is it corroborated by any document on file . . . As regards the complainant's participation in electoral propaganda, the principle must be affirmed that aliens must abstain from such activity. But participation in an electoral tour and the sticking up of election posters is not a clandestine activity, but is carried out openly. No consideration of public safety can prevent the communication to the Conseil d'État of reports or documents showing that the complainant in fact did the acts complained of. Since he does not admit the fact, it must be deemed not to exist.

" While it is not necessary, in the circumstances, to consider whether the privileges given to certain aliens by Article 2 of the Law of February 12, 1897, still operate within the framework of the Law of September 28, 1939, the special position of the complainant, who is married to a Belgian national and with whom he has had a child born in Belgium during his residence in the country, placed upon the Administration a duty to take particular care to justify the expulsion."

[Report: *Pasicrisie belge*, 1954, IV, p. 149.]

Aliens—Expulsion of—Reasons for Expulsion—Judicial Review—Ministerial Discretion—Freedom of Thought and Association—Limits of.

BUJACZ *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. July 13, 1953.

THE FACTS.—The applicant, a Polish national, was on August 4, 1950, notified of a ministerial order, dated July 6, 1950, for his expulsion from Belgian territory. The order stated that the presence of the complainant was considered harmful to the safety of the country. The applicant now sought to have the order annulled, on the grounds, first, that the order did not properly set out the reasons for his expulsion, but merely used a stereotyped formula; secondly, that the Minister had exceeded his powers in ordering the expulsion of the applicant by reference to the fact that the latter was a leader of various Polish associations in Belgium; and, thirdly, that the Minister had misused his powers by using the expulsion of the applicant and a number of his associates as a means for bringing to an end the activities of the

Union of Polish Patriots, which he could have dissolved under the Law of 1921 if it had seriously menaced public order.

Held: that the application must be rejected. It was sufficient for the expulsion order to refer to one of the special circumstances mentioned in the Decree-Law of September 28, 1939. In expelling the applicant on the ground of his activities in Polish associations, the Minister of Justice had exercised the discretion conferred on him by that Decree-Law. There was no evidence to show that the Minister had abused his discretion.

The Court said: " Under the Decree-Law of September 28, 1939, the Minister is not required to specify in an expulsion order the facts which led him to make the order. It is sufficient for him to state which of the special circumstances enumerated in the Decree-Law of September 28, 1939, is relied on as a ground for the expulsion. In stating [in the present case] that the ground for the expulsion was in fact that the presence of the applicant is considered harmful to the safety of the country, all formalities were complied with, and the rights of the defence were not impaired.

" It is alleged, on behalf of the Minister, that the applicant ' played a leading part in various suspect Polish groups in Belgium [and] he also exercised leading functions in the Belgian section of the Polish Workers' Party . . . ;' and ' by the manner in which he carried on his disturbing and subversive activities, he helped to create in Polish circles in Belgium a sentiment dangerous to the public order and safety of the country.'

The applicant admits that he holds a leading position in the Union of Polish Patriots. That association is one of the group to which the Minister alludes as suspect In deeming the activities exercised under cover of the association to be suspect, and in expelling the applicant, who admits that he is one of its leaders, the Minister of Justice exercised the discretionary powers conferred upon him by the Decree-Law of September 28, 1939. The applicant claims that aliens are entitled to enjoy ' freedom of thought ' and ' freedom of political association '; however, the enjoyment of these liberties by aliens is necessarily limited by legal provisions which, in application of Article 128 of the Constitution, permit activities deemed harmful to the safety of the country to be punished by expulsion. . . .

" The Law of June 27, 1921, concerning non-profit-making associations did not limit the powers of expulsion granted to the Government by the Law of February 12, 1897, and conferred on the Minister of Justice by the Decree-Law of September 28, 1939. Neither the allegations of the applicant, nor the criticism that similar action has not been taken in respect of aliens of different nationality or different political leanings, show that the order complained of was taken for a purpose other than that of the above-cited Decree-Law."

[Report: *Pasicrisie belge,* 1954, IV, p. 151.]

Aliens—Expulsion of—Reasons for Expulsion—Judicial Review—Treaties—Operation and Enforcement of—Treaty of Establishment—Condition of Compliance with Local Law.

PIETERS *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. September 30, 1953.

THE FACTS.—The complainant, a national of the Netherlands, owed nearly 2 million francs in taxes to the Public Revenue Department. That Department accordingly suggested to the Aliens Department that he be expelled from the country. The Aliens Department informed the complainant that he had a fortnight in which to make a reasonable proposal for the payment of his outstanding taxes, failing which he would be expelled from the country. The complainant took no action after receiving this warning. Accordingly, by order of the Minister of Justice, dated December 1, 1951, the complainant was ordered to leave the country; the order stated that the presence of the complainant was considered " harmful to the economy of the country ". The complainant now sought to have the order annulled. It was contended on his behalf that the order violated the Treaty of Establishment and Labour concluded on February 20, 1933, between Belgium and the Netherlands. That Treaty provided, on the one hand, for " national " treatment in the matter of taxes, and, on the other, for expulsion only in three cases, namely, of persons dangerous to public morality, to public health, and to the public safety. The Decree-Law of September 28, 1939, under which the expulsion order had been made, could not and did not intend to set aside the provisions of the Treaty. It was further contended that the expulsion order did not sufficiently state the reasons for the order being made.

Held: that the application must be rejected. Only persons complying with the local laws were entitled to the benefit of the Treaty of 1933. The expulsion order was sufficiently particularized.

The Court said: " The Decree-Law of September 28, 1939, did not abrogate the provisions of the Treaty of February 20, 1933. However, by virtue of clause 1 of Article 1, paragraph 1, of that Treaty, the nationals of the High Contracting Parties enjoy the benefits thereof only on condition that they comply with the local law and regulations. The complainant does not deny that he has not complied with Belgian law, and that he did not even take advantage of the opportunity offered to him to do so. Accordingly, he cannot invoke the Treaty, and inasmuch as the Decree-Law of September 28, 1939, authorizes expulsion for non-payment of taxes, such action could be taken against the applicant. . . .

" The order to leave the country is sufficiently particularized seeing that it refers to the special circumstances provided for in the Decree-Law of September 28, 1939, and that it appears from the file that the grounds relied on are substantiated by the facts. In this case the order states that the presence of the complainant is considered harmful to the economy of the country. It appears from the file that the expulsion was ordered by reason of the non-payment by the complainant of taxes due from him. The complainant does not deny this, and the reasons for the expulsion order were known to him before the order was made."

[Report: *Pasicrisie belge*, 1954, IV, p. 164.]

Aliens—Expulsion of—Reasons for Expulsion—Judicial Review.

GROESZ *v.* BELGIAN STATE (MINISTER OF JUSTICE).

Belgium, Conseil d'État. October 28, 1953.

THE FACTS.—The complainant, a Dutch national, was on June 25, 1951, notified of a ministerial order, dated June 13, 1951, for his expulsion from Belgium. The ministerial order, made in pursuance of the Decree-Law of September 28, 1939, concerning the control of aliens, gave as a reason for the expulsion that the complainant's presence in Belgium " is considered to be dangerous to the safety of the country ". The complainant now asked for the annulment of the ministerial order on the ground that he had not been informed of the real reasons for it. It was contended on behalf of the Minister of Justice that he was not required to state the facts giving rise to the order of expulsion, that the archives of the State Security Police (*Sûreté de l'État*) were secret and could not be submitted to the Conseil d'État, and that the administrative file required by law to be so submitted was the file of the Aliens' Department.

Held: that the Minister of Justice must, within thirty days, submit to the registry of the Conseil d'État all documents in the file demonstrating the lawfulness of the expulsion.

The Court said: " In order to enable the Conseil d'État to exercise its function, Article 13 of the Law of December 23, 1946, laid down that the Government must submit to the administrative section the administrative file concerning the cases of which that section is seised. A Decree of the Regent of August 23, 1948, provides that this must be done within thirty days from the date of notification of the complaint. These provisions are generally applicable.

" The law of September 28, 1939, does not authorize the Minister of Justice to make an expulsion order in the absence of any circumstance capable of justifying such a measure.

" While Article 13 of the Law [of December 23, 1946] does not oblige the Government to reveal information the publication of which would constitute a serious danger for public order, that Article does oblige the Government to justify a contested decision before the Conseil d'État. It cannot prove that the decision was covered by the Law of September 28, 1939, by simply referring to a motive formulated in general terms in the decision itself."

[Report: *Pasicrisie belge,* 1954, IV, p. 182.]

Aliens—Expulsion of—Powers of Executive to Cancel a Permanent Residence Permit Granted to an Alien—Whether the Minister is Bound by the *audi alteram partem* Rule in Cancelling such Permit—The Law of South Africa.

URBAN *v.* MINISTER OF THE INTERIOR.

South Africa, Supreme Court, Cape Provincial Division. April 30, 1953.

(Hall J.)

THE FACTS.—Urban came to South Africa in August 1949. Shortly after his arrival he was issued with a permanent residence permit by the Secretary for the Interior, in terms of the Aliens Act, 1 of 1937. On November 18, 1952, he was requested in writing, by the Principal Immigration Officer at Cape Town, to hand over the permit. This he did the following day, and was given in return a letter informing him that the Minister of the Interior had cancelled his permit, under s. 8 (1) of the Aliens Act. The section in question gave two grounds for the cancellation of a permit: incorrect information in the application form, and engaging in an occupation within the first three years of residence in South Africa other than that stated in the application form. Urban, who had changed his occupation three times since coming to the Union, wrote to the authorities asking why permission for him to remain in the country had been withdrawn, but the information was refused. He next approached several Members of Parliament and other public men to take up his case with the Minister, but the representations they made proved to be of no avail. Finally Urban petitioned the Cape Provincial Division of the Supreme Court for an order calling on the Minister to show cause why his cancellation of the residence permit should not be set aside, and restraining him from deporting the petitioner. One of the grounds for the alleged illegality of the cancellation of the permit was that Urban had not been given an opportunity of answering the charges upon which the Minister had based his decision. He had not been supplied with any information as to the nature of these charges, though such was his right, if he were to avail himself of the *audi alteram partem* rule.

Held: that the application should be dismissed. The *audi alteram partem* rule had only limited application, if at all, in this particular case. The Minister discharged his duties in this respect by informing the applicant of the section of the Aliens Act under which he had proceeded in cancelling the permit, and by permitting various persons to make representations to him on the applicant's behalf.

The Judge said: " The . . . point taken (for Urban) is that the applicant was not given the opportunity of answering the allegations upon which the cancellation of his permit is based. He contended that, as the Minister is required by sec. 8 (1) to arrive at a decision upon facts submitted to him, he acts in a *quasi*-judicial capacity and, having once made up his mind, he then acts administratively by issuing instructions to an official of his department. He argued that in all matters where an official of the State is required to act in a *quasi*-judicial capacity, the *audi alteram partem* rule must be applied. As authority for this contention he referred to the judgment of Tindall J.A., which appears in the report of *Sachs* v. *Minister of Justice* (1934 A.D. 11, at p. 22), *Commissioner of Customs and Excise* v. *Watch Tower Bible and Tract Society* (1941 C.P.D. 438, at p. 447), and *Weinrich and Others* v. *Minister of the Interior* (1923 C.P.D. 255, at p. 257). In his judgment in *Sach's* case, Tindall J.A. dealt exhaustively with the *audi alteram partem* rule and his observations were approved by Stratford A.C.J. on p. 38 of the same report. Tindall J.A., while stating that the rule was of general application, said that there were two qualifications to it, *i.e.*, (a) when the statute expressly or by implication indicates the contrary, and (b) that the person giving the decision is bound to permit the person affected by the decision to submit any statements in his favour and an opportunity of controverting prejudicial allegations made against him. With regard to the latter qualification, the learned Judge said that the fact that the person who must make the decision has acted in the first instance without affording the person affected an opportunity of presenting his case, does not necessarily make his order invalid if he affords him that opportunity at some later stage, an executive officer, when exercising such powers, not being required to follow the methods of procedure adopted by a Court of law.

" The operation of this rule was likewise considered in *Jeewa* v. *Dönges, N.O., and Others* (1950 (3) S.A. 414, at p. 422 (A.D.)), which was an appeal against a decision of the Minister granting a deeming order in terms of sec. 22 of Act 22 of 1913. By that section any person convicted of specified criminal offences, ' who by reason of the circumstances of such offence is deemed by the Minister to be an undesirable inhabitant of the Union ', may be deported. The following passage in the judgment of Centlivres A.C.J. appears to me to be in point in this case:

" ' Counsel for the appellant also contended that the maxim *audi alteram partem* had not been excluded by the statute either expressly or implicitly. No machinery is provided by sec. 22 of the Act or any other section for the hearing of a person against whom the Minister may propose to cause a deportation order to be issued, and in the absence of any indication in the statute to the contrary, it would be presumptuous for the judiciary to impose its own methods on administrative or executive officers. . . . The most that can be contended for is that any person concerned should be given an opportunity to make representations to the Minister before he acts under sec. 22. For the purpose of this case I shall assume that the requirement of giving such an opportunity is not inconsistent with the provisions of sec. 22. In the present case the appellant was given such an opportunity, for the Minister states in his affidavit that before arriving at his conclusion he carefully and *bona fide* considered the representations submitted to him on behalf of the appellant.'

"Counsel 'seeks to distinguish the present case from *Jeewa's* case' and argues that, while in this latter case the statute gave the Minister an absolute discretion, this is not the case here, for his decision to cancel the permit involves an examination into a factual position and a finding of fact. It seems to me that, if a Minister is required by a statute to decide whether a criminal should be deported by reason of the circumstances of the offence he has committed, there must be a consideration of the facts by the Minister and a decision based upon the facts disclosed by the record of the case and upon any other information placed before him. I fail, therefore, to see any distinction between *Jeewa's* case and the present one and I . . . shall follow, with respect, the course adopted by the learned Chief Justice in *Jeewa's* case and I shall assume that the requirement of giving such an opportunity is not inconsistent with the provisions of sec. 8 (1) of the Act.

"The sub-section postulates two grounds for cancellation, namely, incorrect information in an application form, or the engaging in an occupation within the first three years other than that stated in the application form to be the applicant's occupation. The applicant in this case was informed that his permit was cancelled in pursuance of the provisions of sec. 8 (1) of the Act. The information which he had given in his application form was within his knowledge and likewise the occupations he had followed during the first three years he had lived in the Union. He states that immediately after he received annexure A (the letter cancelling his permit) to his petition, he caused representations to be made to the Minister by a considerable number of persons of standing in the community, and the Minister states that he considered carefully the facts which were placed before him by these people and he came to the conclusion that no good reason existed for the alteration of his previous decision. The facts placed before the Minister by the applicant's emissaries must have been such facts as would in the applicant's opinion be likely to affect the Minister's decision in his favour. It seems to me, therefore, that the opportunity to make representations to the Minister was duly afforded to the applicant and made use of by him and I come to the conclusion that the *audi alteram partem* rule is not applicable in this case . . ."

[Report: 1953 (3) S.A. 544 [C].]

Aliens—Expulsion of—Subsequent Grant of Entry Visa—Nullification of Expulsion Order—The Law of Chile.

In re López.

Chile, Court of Santiago. June 2, 1953.

The Facts.—Antonio Guardiola López, a Spanish national, was expelled from Chile in 1946 for having engaged in Communist activities and for interfering in Chilean politics. In 1953 he returned to Chile, travelling on an Uruguayan passport which had received a Chilean visa. He was arrested by the Investigation Service of the Government of Chile on the ground that the expulsion order was still outstanding. He sought his release in an *amparo* action.

Held: that *amparo* must be granted. The Court found that the grant of a Chilean visa to the petitioner thereby authorizing his admission to the country, constituted a nullification of the expulsion order.

[Report: *Revista de Derecho, Jurisprudencia y Ciencias Sociales y Gaceta de los Tribunales* 50 (1953), Part IV, p. 67.]

Aliens—Expulsion of—Right of Expulsion—Deportation for Commission of Crime—Deportation of Persons Who Had Made " Entry " into Country—Whether Arrival of a Filipino in the United States Constitutes an Entry—The Philippines as a " Foreign Country " before Independence—The Law of the United States of America.

See p. 276 (*Barber* v. *Gonzales*).

ii.—Procedure of Expulsion

Aliens—Expulsion of—Procedure—Due Process of Law—Alien Seaman Lawfully Permanently Resident—Exclusion upon Return from Foreign Voyage—Necessity of a Hearing—Exclusion and Deportation on Basis of Confidential Information—The Law of the United States of America.

Kwong Hai Chew *v.* Colding *et al.*

United States, District Court, Eastern District, New York. May 11, 1951.

Court of Appeals, Second Circuit. December 4, 1951.

Supreme Court. February 9, 1953.

(Vinson C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.)

The Facts.—Kwong Hai Chew was a Chinese seaman last admitted to the United States in 1945. He married an American woman and bought a home in New York, in which they resided.

During the Second World War, he served with credit in the United States Merchant Marine. Having proved his good moral character for the five preceding years, he secured suspension of deportation. In 1949, he was admitted to permanent residence in the United States. In 1950, he was screened and passed by the Coast Guard for employment on a merchant vessel.

He signed articles in November 1950 as chief steward on the S.S. *Sir John Franklin*, a vessel of United States registry. Upon the return of the vessel from a voyage to the Far East in March 1951, the immigration inspector ordered him " temporarily excluded " as an alien whose entry was deemed prejudicial to the public interest. Kwong Hai Chew thereupon sought a writ of habeas corpus, charging that his detention was arbitrary and capricious and a denial of due process of law in violation of the Fifth Amendment to the Constitution of the United States. The Attorney-General directed that he be denied a hearing before a Board of Special Inquiry and that his " temporary exclusion be made permanent ". The petitioner was detained at Ellis Island and was denied information as to the accusations against him and opportunity to be heard in opposition to the order for his " exclusion ". The writ of habeas corpus was issued by the federal District Court. Upon hearing,

Held (by the District Court, *sub nom. United States ex rel. Kwong Hai Chew* v. *Colding et Al.; The Sir John Franklin*): that the writ must be dismissed on the authority of *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 94 L.Ed. 317, 70 Sup.Ct. 309 (1950)[1]. Each return of an alien from abroad is a new entry, and the decision of the political branch of the Government to exclude a given alien is not subject to judicial review. [Report: 97 F.Supp. 592.]

Bail was denied (98 F.Supp. 717). On appeal,

Held (by the Court of Appeals): that the order of the District Court must be affirmed on the authority of the *Knauff* case, *supra*. [Report: 192 F.2d 1009.]

Kwong Hai Chew petitioned for *certiorari*, and the writ was granted (345 U.S. 933, 96 L.Ed. 1341, 72 Sup. Ct. 769).

Held (by the Supreme Court): that the judgment of the Court of Appeals must be reversed and the cause remanded to the District Court. As an alien who was a lawful permanent resident of, and physically present in, the United States, Kwong Hai Chew would have had a constitutional right to due process. The constitutional status which he enjoyed prior to his voyage was not terminated by that voyage, without regard to whether or not, for immigration purposes, he is to be treated as an entrant alien.

The Court said (*per* Burton J.): " A preliminary consideration that is helpful to the solution of this litigation is whether, under

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[1 See *Annual Digest*, 1949, Case No. 74.]

8 CFR § 175.57 (b),[1] the Attorney General has authority to deny to a lawful permanent resident of the United States, who is an alien continuously residing and physically present therein, the opportunity to be heard in opposition to an order for his ' permanent exclusion ' and consequent deportation, provided the Attorney General determines that the order is based on information of a confidential nature, the disclosure of which would be prejudicial to the public interest. Assuming, as seems to be clear, that the Attorney General does not have such authority, the critical issue then presented is whether he has that authority under the following additional circumstances: the resident alien is a seaman, he currently maintains his residence in the United States and usually is physically present there, however, he is returning from a voyage as a seaman on a vessel of American registry from its home port in the United States, that voyage has included scheduled calls at foreign ports in the Far East, and he is detained on board by order of the Attorney General. For the reasons hereafter stated, we hold that these additional circumstances do not change the result and that the Attorney General does not have the authority suggested. . . .

" The issue is petitioner's detention, without notice of any charge against him and without opportunity to be heard in opposition thereto. Petitioner contends that such detention is not authorized by 8 CFR § 175.57 (b). He contends also that, if that regulation does purport to authorize such detention, the regulation is invalid as an attempt to deprive him of his liberty without due process of law in violation of the Fifth Amendment. Agreement with petitioner's first contention makes it unnecessary to reach his second.

" The case of *Knauff* v. *Shaughnessy*, *supra*, relied upon below, is not in point. It relates to the rights of an alien entrant and does not deal with the question of a resident alien's right to be heard. For purposes of his constitutional right to due process, we assimilate petitioner's status to that of an alien continuously residing and physically present in the United States.[1] To simplify the issue, we consider first what would have been his constitutional right to a hearing had he not undertaken his voyage to foreign ports but had remained continuously within the territorial boundaries of the United States.

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[1] " § 175.57 *Entry not permitted in special cases* . . .

" (b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."

The categories set forth in § 175.53 as a basis for exclusion are those defined " to be prejudicial to the public interest." They include, for example, membership in " a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest . . ." or being " engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States." 8 CFR.

For statutory language similar to that in 8 CFR § 175.57, see § 5 of the Act of October 16, 1918, as amended by the Subversive Activities Control Act of 1950, 64 Stat. 1008, 8 U.S.C. (Supp. V) § 137–4, referring to aliens who are " excludable " under § 137. The Government, in the instant case, relies upon 8 CFR § 175.57, rather than upon 8 U.S.C. (Supp. V) § 137–4.

" I. It is well established that if an alien is a lawful permanent resident of the United States and remains physically present here, he is a person within the protection of the Fifth Amendment. He may not be deprived of his life, liberty or property without due process of law.[2] Although it later may be established, as respondents contend, that petitioner can be expelled and deported, yet before his expulsion, he is entitled to notice of the nature of the charge and a hearing at least before an executive or administrative tribunal.[3]

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[1] In this opinion " exclusion " means preventing someone from entering the United States who is actually outside of the United States or is treated as being so. " Expulsion " means forcing someone out of the United States who is actually within the United States or is treated as being so. " Deportation " means the moving of someone away from the United States, after his exclusion or expulsion.

[2] " . . . The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the rights guaranteed by the Constitution to all people within our borders. Such rights include those protected by the First and the Fifth Amendments and by the due process clause of the Fourteenth Amendment. None of these provisions acknowledges any distinction between citizens and resident aliens. They extend their inalienable privileges to all ' persons ' and guard against any encroachment on those rights by federal or state authority." *Bridges* v. *Wixon*, 326 U.S. 135, 161 (concurring opinion).

" The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. . . . And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment." *Johnson* v. *Eisenträger*, 339 U.S. 763, 770–771 [*Annual Digest*, 1949, Case No. 153].

The latter case also comments that " in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.*, at 771. That case related to nonresident enemy aliens who had never been in the United States, rather than to a lawful permanent resident in the position of petitioner. There is no lack of physical presence for jurisdictional purposes in the instant case.

[3] ". . . But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in ' due process of law ' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect of the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by Congress, and at the same

Although Congress may prescribe conditions for his expulsion and deportation, not even Congress may expel him without allowing him a fair opportunity to be heard.[1] For example, he is entitled to a fair chance to prove mistaken identity. At the present stage of the instant case, the issue is not one of exclusion, expulsion or deportation. It is one of legislative construction and of procedural due process.[2]

"This being recognized, we interpret this regulation as making no attempt to question a resident alien's constitutional right to due process. Section 175.57 (b) uses the term 'excludable' in designating the aliens to which it applies. That term relates naturally to entrant aliens and to those assimilated to their status. The regulation nowhere refers to the expulsion of aliens, which is the term that would apply naturally to aliens who are lawful permanent residents physically present within the United States. Accordingly, we find no language in the regulation that would have required its application to petitioner had he remained continuously and physically within the United States.[3] It thus seems clear that the Attorney General would not have had the authority to deny to petitioner a hearing in opposition to such an order as was here made, provided petitioner had remained within the United States.

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time be appropriate to the nature of the case upon which such officers are required to act. Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized." *The Japanese Immigrant Case*, 189 U. S. 86, 100–101.

"... It was under compulsion of the Constitution that this Court long ago held that an antecedent deportation statute must provide a hearing at least for aliens who had not entered clandestinely and who had been here some time even if illegally." *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, 49–50 [*International Law Reports*, 1950, Case No. 76]. See also *Johnson* v. *Eisenträger*, *supra*, at 770–771; *Carlson* v. *Landon*, 342 U. S. 524, 538.

[1] See *Fong Yue Ting* v. *United States*, 149 U. S. 698, recognizing the right to expel and deport resident aliens. "When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality." *Wong Yang Sung* v. *McGrath*, *supra*, at 50; *Kwock Jan Fat* v. *White*, 253 U. S. 454, 457–458, 464 [*Annual Digest*, 1919–1922, Case No. 134].

[2] It is to be noted that the cases generally cited in this field in relation to the exclusion, expulsion or deportability of resident aliens deal only with that ultimate issue, and not with the right of the resident alien to a hearing sufficient to satisfy procedural due process. The reports show that there were hearings and that in some cases the Court considered whether the hearings had been fair. *E.g.*, *United States* v. *Smith*, 289 U. S. 422, 424; *United States* v. *Corsi*, 287 U. S. 129, 131; *United States ex rel. Claussen* v. *Day*, 279 U. S. 398, 400; *Quon Quon Poy* v. *Johnson*, 273 U. S. 352, 358; *Lewis* v. *Frick*, 233 U. S. 291, 293; *Lapina* v. *Williams*, 232 U. S. 78, 83; *Fong Yue Ting* v. *United States*, 149 U. S. 698, 729.

[3] The preceding subsection, 175.57 (a), uses the additional word "deported" but only to supplement "excluded": "Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States." 8 CFR.

" The regulation before us was issued by the Secretary of State and concurred in by the Attorney General, pursuant to Presidential Proclamations No. 2523, 3 CFR, 1943 Cum. Supp. 270, and No. 2850, 3 CFR, 1949 Supp., 41. The latter proclamation issued August 17, 1949, also ' ratified and confirmed ' the regulation. Those proclamations, in turn, depend upon § 1 of the Act of May 22, 1918, 40 Stat. 559, as amended, June 21, 1941, 55 Stat. 252, 22 U. S. C. § 223. It is not questioned that the regulations, as above interpreted, comes within these authorizations, or that such authorizations have been extended to include the dates material in this case. 66 Stat. 163, 333. We find nothing in the statute or the proclamations which calls for, permits or sustains a broader interpretation of 8 CFR § 175.57 (b) than we have given to it. The wording also now reflects congressional intent because substantially the same language was inserted by Congress in the Subversive Activities Control Act of 1950, 64 Stat. 1008. See note 1, *supra* [p. 345].

" 2. Petitioner's final contention is that if an alien is a lawful permanent resident of the United States and also is a seaman who has gone outside of the United States on a vessel of American registry, with its home port in the United States, and, upon completion of such voyage, has returned on such vessel to the United States and is still on board, he is still, from a constitutional point of view, a person entitled to procedural due process under the Fifth Amendment. We do not regard the constitutional status which petitioner indisputably enjoyed prior to his voyage as terminated by that voyage. From a constitutional point of view, he is entitled to due process without regard to whether or not, for immigration purposes he is to be treated as an entrant alien, and we do not now reach the question whether he is to be so treated.

" Section 175.57 (b)'s authorization of the denial of hearings raises no constitutional conflict if limited to ' excludable ' aliens who are not within the protection of the Fifth Amendment. The assimilation of petitioner, for constitutional purposes, to the status of a continuous resident physically present in the United States also accords with the Nation's immigration and naturalization program. For example, for purposes of naturalization, such an assimilation was expressly prescribed in the Nationality Act of 1940:

' Sec. 307. (a) No person . . . shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years . . . .

' (d) The following shall be regarded as residence within the United States within the meaning of this chapter: . . .

' (2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization' 54 Stat. 1142–1143, 8 U. S. C.

§ 707. See also § 325, 54 Stat. 1150, as amended, 64 Stat. 1015, 8 U. S. C. (Supp. V) 725.[1]

" While it may be that a resident alien's ultimate right to remain in the United States is subject to alteration by statute or authorized regulation because of a voyage undertaken by him to foreign ports, it does not follow that he is thereby deprived of his constitutional right to procedural due process. His status as a person within the meaning and protection of the Fifth Amendment cannot be capriciously taken from him. Where neither Congress, the President, the Secretary of State nor the Attorney General has inescapably said so, we are not ready to assume that any of them has attempted to deprive such a person of a fair hearing.[2]

" This preservation of petitioner's right to due process does not leave an unprotected spot in the Nation's armor. Before petitioner's admission to permanent residence, he was required to satisfy the Attorney General and Congress of his suitability for that status. Before receiving clearance for his foreign cruise, he was screened and approved by the Coast Guard. Before acceptance of his petition for naturalization, as well as before final action thereon, assurance is necessary that he is not a security risk. See 8 U. S. C., c. 11, Subchapter III—Nationality Through Naturalization, §§ 701–747, as amended.

" We do not reach the issue as to what would be the constitutional status of 8 CFR § 175.57 (b) if it were interpreted as denying to petitioner all opportunity for a hearing. Also, we do not reach the issue as to what will be the authority of the Attorney General to order the deportation of petitioner after giving him reasonable notice of the charges against him and allowing him a hearing sufficient to meet the requirements of procedural due process.

" For the reasons stated, we conclude that the detention of petitioner, without notice of the charges against him and without opportunity to be heard in opposition to them, is not authorized by 8 CFR § 175.57 (b)."

(Minton J. dissented.)

[Reports: 344 U.S. 590, 97 L.Ed. 576, 73 Sup.Ct. 472.]

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[1] This provision survives in a modified form in § 330 of the Immigration and Nationality Act of 1952, 66 Stat. 251. Section 330 (b) includes a savings clause affecting those who applied for naturalization before September 23, 1950. Section 405 (a) also contains a general savings clause. 66 Stat. 280.

[2] Existing statutory and administrative provisions for " Exclusion Without Hearing " are discussed in the Report of the President's Commission on Immigration and Naturalization entitled " Whom We Shall Welcome " dated January 1, 1953, at pages 228–231. The discussion treats the provisions as applicable to entrant and reentrant aliens but does not even suggest that they are applicable to aliens lawfully admitted to permanent residence and physically present within the United States. The report discusses the harshness of the " reentry doctrine " and recommends its modification at pages 199–200. It does not, however, even suggest that the reentry doctrine attempts to limit the constitutional right to a hearing which resident aliens, in the status of petitioner, may have under the Fifth Amendment. The instances of hardship which the report cites appear to have been disclosed at hearings held on the issue of the alien's right to reenter.

NOTE.—The above case is noted in *Columbia Law Review*, 53 (1953), p. 872; *Michigan Law Review*, 51 (1953), p. 1231; and *New York University Law Review*, 28 (1953), p. 893.

Aliens—Expulsion of—Procedure of Expulsion—Judicial Review—The Law of the United States of America.

HEIKKILA *v.* BARBER *ET AL.*

United States, Supreme Court. March 16, 1953.

(Vinson C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark, Minton JJ.)

THE FACTS.—Heikkila was an alien whose deportation had been ordered by the Attorney-General of the United States. He commenced an action against the District Director of the Immigration and Naturalization Service by an application seeking a "review of agency action" under Section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. § 1009, as well as injunctive and declaratory relief. His main substantive claim was that Section 22 of the Internal Security Act of 1950, 64 Stat. 1006 (now Section 241 of the Immigration and Nationality Act, 1952, 66 Stat. 204, 8 U.S.C. § 1251), upon which the order of deportation was based and which makes membership in the Communist Party *per se* a ground for deportation, was unconstitutional. A three-Judge District Court dismissed the application without opinion. Heikkila appealed directly to the Supreme Court. He maintained that Section 22 of the Internal Security Act of 1950 was unconstitutional, and that he was entitled to review of the deportation order in his case under Section 10 of the Administrative Procedure Act.

Held: that the judgment of the District Court must be affirmed. An alien whose deportation had been ordered by the Attorney-General under the Immigration Act of 1917 could not obtain a review of the decision of the Attorney-General under Section 10 of the Administrative Procedure Act. Habeas corpus was the only means by which an alien could challenge in the courts an order of deportation by the Attorney-General.

The Court said (*per* Clark J.): "It is clear that prior to the Administrative Procedure Act habeas corpus was the only remedy by which deportation orders could be challenged in the courts.[1] The courts have consistently rejected attempts to use injunctions, delcaratory judgments and other types of relief for this purpose.[2] Accordingly, in asserting the availability of judicial review of the type sought here, appellant relies primarily on § 10 of the Administrative Procedure Act,[1] conceding that the question has not yet been decided by this Court. The Government contends that because § 19 (a) of the Immigration Act of 1917[2] makes the decision of the Attorney General 'final' the underlying statute precludes judicial review and comes within the first exception to § 10.

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[1] Mr. Chief Justice Stone, dissenting (on other grounds), in *Bridges* v. *Wixon*, 326 U. S. 135, 167 (1945).

[2] *Fafalios* v. *Doak*, 60 App. D. C. 215, 50 F.2d 640; *Poliszek* v. *Doak*, 61 App.D. C. 64, 57 F.2d 430; *Kabadian* v. *Doak*, 62 App. D.C. 114, 65 F.2d 202; *Darabi* v. *Northrup*, 54 F.2d 70. See also *Impiriale* v. *Perkins*, 62 App. D. C. 279; 66 F.2d 805, *Azzollini* v. *Watkins*, 172 F.2d 897.

" Apart from the words quoted, the Administrative Procedure Act itself is silent on which 'statutes preclude judicial review.' Both the Senate and the House Committee Reports on the Act commented that 'Very rarely do statutes withhold judicial review.'[3] And the House Report added that 'To preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review is certainly no evidence of intent to withhold review.'[4] The spirit of these statements together with the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review. However, such generalities are not dispositive of the issue here, else a balance would have to be struck between those in the Committee reports and material in the debates which indicates inconsistent legislative understandings as to how extensively § 10 changed the prior law on judicial review.[1] No easy answer is found in our decisions on the subject. Each statute in question must be examined individually; its purpose and history as well as its text are to be considered in deciding whether the courts were intended to provide relief for those aggrieved by administrative action. Mere failure to provide for judicial intervention is not conclusive; neither is the presence of language which appears to bar it.[2]

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[1] " Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

" (a) Right of review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

" (b) Form and venue of action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

" (c) Reviewable acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. . . .

" (e) Scope of review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." 60 Stat. 243, 5 U.S.C. § 1009.

[2] " In every case where any person is ordered [to be] deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final." 39 Stat. 889, as amended, 54 Stat. 1238, 8 U. S. C. § 155 (a). We do not consider the 1952 Act, 66 Stat. 163, which took effect after Heikkila's complaint was filed.

[3] Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess., 212, 275.

[4] Legislative History, 275.

" That the Attorney General's decisions are ' final ' does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But ' final,' as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that ' All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury.' The appellant in *Ekiu* v. *United States*, 142 U. S. 651 (1892) argued that if § 8 was interpreted as making the administrative exclusion decision conclusive, she was deprived of a constitutional right to have the courts on habeas corpus determine the legality of her detention and, incidental thereto, examine the facts on which it was based. Relying on the peculiarly political nature of the legislative power over aliens, the Court was clear on the power of Congress to entrust the final determination of the facts in such cases to executive officers. Cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580 (1952).[3] Mr. Justice Gray found that § 8 was ' manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act.' 142 U. S., at 663. With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, *e. g.*, § 25 of the 1903 Act, 32 Stat. 1220, and

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[1] Legislative History, 311, 325.

[2] *Ludecke* v. *Watkins*, 335 U. S. 160 (1948) [*Annual Digest*, 1948, Case No. 166]; *American Federation of Labor* v. *Labor Board*, 308 U. S. 401 (1940); *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 (1943); *Stark* v. *Wickard*, 321 U. S. 288 (1944).

[[3] *International Law Reports*, 1952, Case No. 69.]

§ 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1893). In *Lem Moon Sing* v. *United States*, 158 U. S. 538 (1895), treating a comparable provision for the enforcement of the Chinese Exclusion Act, Mr. Justice Harlan observed that when Congress made the administrative decision final, 'the authority of the courts to review the decision of the executive officers was taken away.' *Id.*, at 549. And by 1901, Mr. Chief Justice Fuller was able to describe as ' for many years the recognized and declared policy of the country ' the congressional decision to place ' the final determination of the right of admission in executive officers, without judicial intervention.' *Fok Yung Yo* v. *United States*, 185 U. S. 296, 305 (1902). See also *The Japanese Immigrant Case* (*Yamataya* v. *Fisher*), 189 U. S. 86 (1903); *Pearson* v. *Williams*, 202 U. S. 281 (1906); *Zakonaite* v. *Wolf*, 226 U. S. 272 (1912).

" Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution.[1] And the decisions have continued to regard this point as settled. *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon*, 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States*, 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large*, 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. Whatever view be taken as to the breadth of § 10 of the Administrative Procedure Act, the first exception to that section applies to the case before us. The result is that appellant's rights were not enlarged by that Act. Now, as before, he may attack a deportation order only by habeas corpus.[2]

" The three Court of Appeals decisions to the contrary have taken the position that habeas corpus itself represented judicial review, albeit of a limited nature. *United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457; *Kristensen* v. *McGrath*, 86 U. S. App. D. C. 48, 179 F. 2d 796; *Prince* v. *Commissioner*, 185 F. 2d 578. Under this approach, the finality of an administrative decision must be absolute before the first exception to § 10 can apply. Our difficulty with this position begins with the nature of the writ and ends with the language of § 10. Regardless of whether or not the scope of inquiry on habeas corpus has been expanded,[1] the function of the courts has always been limited to the enforcement of due process requirements. To review those requirements under the Constitution, whatever the intermediate formulation of their constituents, is very different from applying a statutory standard of review, *e. g.*, deciding ' on the whole record ' whether there is substantial evidence to support administrative findings of fact under § 10 (e). Yet, for all that appears, § 10 (e) might be called into play as well as § 10 (b) if habeas corpus were regarded as judicial review.[2] In short, it is the scope of inquiry on habeas corpus that differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act. We hold that deportation orders remain immune to direct attack.

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[1] The Senate Committee said, " The last [finality] provision, while new in this particular location, is not new in the law, the courts having repeatedly held that in the cases of aliens arrested for deportation, as well as in the cases of those excluded at our ports, the decision of the administrative officers is final, and the Supreme Court having in several decisions regarded the case of the alien arrested for deportation as practically a deferred exclusion (*The Japanese Immigrant Case*, 189 U. S. 86; *Pearson* v. *Williams*, 202 U. S. 281; etc.)." S. Rep. No. 352, 64th Cong., 1st Sess. Vol. 2, 16.

[2] We need not consider whether the same result follows from the first part of § 10 (b), " The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute. . . ."

" Heikkila suggests that *Perkins* v. *Elg*, 307 U. S. 325 (1939)[3] (declaratory and injunctive relief), and *McGrath* v. *Kristensen*, 340 U. S. 162 (1950)[4] (declaratory relief), were deviations from this rule. But neither of those cases involved an outstanding deportation order. Both Elg and Kristensen litigated erroneous determinations of their status, in one case citizenship, in the other eligibility for citizenship. Elg's right to a judicial hearing on her claim of citizenship had been recognized as early as 1922 in *Ng Fung Ho* v. *White*, 259 U. S. 276.[5] And Kristensen's ineligibility for naturalization was set up in contesting the Attorney General's refusal to suspend deportation proceedings under the special provisions of § 19 (c) of the 1917 Immigration Act, as amended, 8 U. S. C. § 155 (c). Heikkila's status as an alien is not disputed and the relief he wants is against an outstanding deportation order. He has not brought himself within *Elg* or *Kristensen*.

" Appellant's Administrative Procedure Act argument is his strongest one. The reasons which take his case out of § 10 apply *a fortiori* to arguments based on the general equity powers of the federal courts and the Declaratory Judgment Act. 28 U. S. C. § 2201. See *Skelly Oil Co.* v. *Phillips Co.*, 339 U. S. 667, 671–672 (1950). Because we decide the judgment below must be affirmed on this procedural ground, we do not reach the other questions briefed and argued by the parties.

" The rule which we reaffirm recognizes the legislative power to prescribe applicable procedures for those who would contest deportation orders. Congress may well have thought that habeas corpus, despite its apparent inconvenience to the alien, should be the exclusive remedy in these cases in order to minimize opportunities for repetitious litigation and consequent delays as well as to avoid possible venue difficulties connected with any other type of action.[1] We are advised that the Government has recommended legislation which would permit what Heikkila has tried here. But the choice is not ours."

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[1] Compare *The Japanese Immigrant Case*, 189 U. S. 86 (1903), with *United States ex rel. Vajtauer* v. *Commissioner*, 273 U. S. 103 (1927), and *Bridges* v. *Wixon*, 326 U.S. 135 (1945).

[2] The lower courts have split on this question and we express no opinion on it now. *Yiakoumis* v. *Hall*, 83 F. Supp. 469; *Lindenau* v. *Watkins*, 73 F. Supp. 216.

[[3] *Annual Digest*, 1938–1940, Case No. 116.]

[[4] *International Law Reports*, 1950, Case No. 67.]

[[5] *Annual Digest*, 1919–1922, Case No. 180.]

Frankfurter J., with whom Black J. joined, dissented. The dissenting Justices took the view that since the finality under the Immigration Act of 1917 of orders for deportation did not preclude challenges thereto by way of habeas corpus, that Act did not actually " preclude judicial review ". Deportation orders were therefore not within the scope of the exception to the general right of review under the Administrative Procedure Act. Frankfurter J. said:

" Three Courts of Appeals have decided that under the Administrative Procedure Act an alien against whom a deportation order is outstanding may challenge the validity of that order by asking for a declaratory judgment. Since 1946, so they held, he has not been restricted to habeas corpus for the assertion of his rights, and therefore has not needed to wait till he is arrested for deportation. The careful opinions of Judge Goodrich for the Third Circuit in *United States ex rel. Trinler* v. *Carusi,* 166 F.2d 457, of Judge Bazelon for the District of Columbia Circuit in *Kristensen* v. *McGrath,* 86 U. S. App. D. C. 48, 179 F. 2d 796, and of Judge McAllister for the Sixth Circuit in *Prince* v. *Commissioner,* 185 F. 2d 578, make it abundantly clear why the Administrative Procedure Act should be treated as a far-reaching remedial measure, affording ready access to courts for those who claim that the administrative process, once it has come to rest, has disregarded judicially enforceable rights. The legislative materials concerning the Administrative Procedure Act—the reports of Committees and especially the authoritative elucidation of the measure by Chairman McCarran—impressively support the direction of thought which underlies the decisions of the three Courts of Appeals. It is appropriate to say that in disagreeing with these decisions, this Court is aware that ' the broadly remedial purposes of the Act counsel a judicial attitude of hospitality towards the claim that § 10 greatly expanded the availability of judicial review.' The Court is inhibited from yielding to this ' attitude of hospitality ' because the only way in which a deportation order may be challenged under the existing Immigration Act is habeas corpus, and because the scope of inquiry on habeas corpus is what it is. The Court concludes that this limited scope of inquiry brings the Immigration Act within the exception to the provision authorizing an ' action for a declaratory judgment ' under § 10 (b), in that the Immigration Act is one of the statutes that ' preclude judicial review '. 60 Stat. 243, 5 U. S. C. § 1009. In short, the Court gives the phrase ' judicial review ' in § 10 a technical content and thereby disregards the vital fact that although § 19 of the Immigration Act of 1917, 39 Stat. 874, 889, as amended in 1940, 54 Stat. 1238, 670, 671, makes the decisions of the Attorney General

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[1] See *Paolo* v. *Garfinkel,* 200 F. 2d. 280.

' final,' they are not finally final. As the hundreds of cases in the lower courts demonstrate, the Attorney General's actions are voluminously challenged and frequently set aside. No doubt the respect accorded to his findings is much more extensive than that accorded to findings of other agencies, or, to put it technically, ' the scope of inquiry ' is more limited. But the decisive fact is that the findings of the Attorney General are subject to challenge in the courts and from time to time are upset, whatever the formulas may be by which what he has finally done is undone.

" If anything is plain in the legislative history of the Administrative Procedure Act it is that the Congress was not concerned with formularies when it referred to statutes which ' preclude judicial review.' Senator McCarran was closely questioned about this matter and he had to satisfy Senators as to the very restricted meaning of this exception. He was not talking about ' review ' in any technical sense. He was talking about the opportunity to go into court and question what an administrative body had done. And he referred to those rare cases when ' a statute denies resort to the court.' The bill, he said, ' would not set aside such statute.' And then he repeated in a paraphrase what he had meant—a denial of ' resort to the court '—in loose lawyers' language: ' If a statute denies the right of review, the bill does not interfere with the statute.' S. Doc. No. 248, 79th Cong., 2d Sess. 319. He had already made clear what his statement, ' the bill does not interfere with the statute,' meant by pointing out that the exception to ready access to the courts was limited to a ' law enacted by statute by the Congress of the United States, granting a review or denying a review . . . . We were not setting ourselves up to abrogate acts of Congress.' *Id.*, at 311.

" To allow a proceeding for a declaratory judgment to test the same issues that are open on habeas corpus is to abrogate no Act of Congress. It is rather, to adopt, as between two permissible constructions of the Administrative Procedure Act, the one that evinces ' a judicial attitude of hospitality.' The Court shrinks from such a construction, with obvious reluctance, because it thinks it cannot adopt it without subjecting an order of deportation to new and unlimited judicial scrutiny. Surely this is a needless fear. A declaratory judgment action under § 10 (b) can be limited—as it should be—to the scope of review appropriate to the extraordinary remedy of habeas corpus. The Administrative Procedure Act is not to be construed, and it is easy not to construe it, so as to modify the Immigration Act and to allow courts to examine what the Attorney General has done beyond those substantive limits to which habeas corpus is now confined. But it is equally easy, and therefore I believe compelling, to construe the Administrative Procedure Act so as to loosen up the means by which the scrutiny provided for by the Immigration Act may be undertaken, to the extent that the technical conditions for habeas corpus, namely that a person must be in physical custody, can be dispensed with where a claim, capable of being vindicated through habeas corpus, is found.

" The point is legally narrow but practically important. It means that one against whom a deportation order is outstanding but not executed may at once move by means of a declaratory judgment, to challenge the administrative process insofar as the substantive law pertaining to deportation permits challenge. Of course Congress may now explicitly afford this relief. It may do so without opening the sluices of 'review' in deportation cases. But it has already enabled us to do so under the Administrative Procedure Act. I think the Act is sufficiently supple not to require further legislation. The three opinions in the Court of Appeals, to which reference has already been made, elaborate the grounds on which I would sustain the jurisdiction of the District Court."

[Reports: 345 U. S. 229; 97 L.Ed. 972; 73 Sup. Ct. 603.]

NOTE.—Heikkila subsequently brought a second action against the District Director of the Immigration and Naturalization Service, in which he maintained that he was afforded a remedy, other than by habeas corpus, under the Immigration and Nationality Act of 1952. It was held that this question was *res judicata* under the earlier decision of the Supreme Court, and his application was dismissed. [Report: 216 F. 2d 407 (1954).]

The principal case is noted in *Notre Dame Lawyer*, 28 (1953), p. 548, and *Yale Law Journal*, 62 (1953), p. 1000.

Aliens—Expulsion of—Procedure—Review of Deportation Order by Administrative Board—Failure of Board to Exercise its Discretion—Dictation of Decision of Board by Attorney-General—The Law of the United States of America.

UNITED STATES *ex rel.* ACCARDI *v.* SHAUGHNESSY.

United States, Court of Appeals, Second Circuit. August 11, 1953.
Supreme Court. March 15, 1954.

(Warren C.J.; Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.).

THE FACTS.—Accardi was born in Italy of Italian parents in 1909, and entered the United States by train from Canada in 1932 without immigration inspection and without an immigration visa. He was thus subject to deportation under Section 14 of the Immigration Act of 1924, 43 Stat. 162 (now Subsections 241(a)(1) and (2) of the Immigration and Nationality Act of 1952, 66 Stat. 204, 8 U.S.C. § 1251(a)(1) and (2)). Deportation proceedings against Accardi were begun in 1947. In 1948 he applied for suspension of deportation pursuant to Subsection 19(c) of the Immigration Act of 1917, 39 Stat. 889, as amended (now Section 244 of the Immigration and Nationality Act of 1952, 66 Stat. 214, 8 U.S.C. § 1254), which provides:

> "In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a

citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon July 1, 1948."

Hearings on the deportation charge and the application for suspension of deportation were held before officers of the Immigration and Naturalization Service from 1948 to 1952. A hearing officer ultimately found Accardi deportable and recommended a denial of discretionary relief. The Acting Commissioner of Immigration adopted the officer's findings and recommendation, and in April 1953 the Board of Immigration Appeals affirmed. A warrant of deportation was issued.

Accardi petitioned for a writ of habeas corpus in a federal District Court, and the writ was dismissed. His wife thereupon commenced this action by filing a petition for a second writ of habeas corpus. Accardi contended that the denial of his application by the Board of Immigration Appeals was prejudged by the issuance by the Attorney-General in 1952 of a confidential list of " unsavory characters " including his name, which made it impossible for him " to secure fair consideration of his case ". The District Judge denied the writ.

On appeal,

Held (by the Court of Appeals): that the order of the District Court must be affirmed. The administrative record amply supported a refusal to suspend deportation. There was nothing in the record to indicate that the administrative officials considered anything but that record in arriving at a decision in the case. The assertion of mere " suspicion " that extraneous matters were considered does not require a hearing. [Report: 206 F. 2d 897.]

Accardi petitioned for *certiorari*, and the writ was granted (346 U.S. 884, 98 L.Ed. 389, 74 Sup.Ct. 138).

Held (by the Supreme Court): that the judgment of the Court of Appeals must be reversed. The promulgation of a list of " unsavory characters " deprived the Board of Immigration Appeals of the opportunity to exercise its own discretion, contrary to existing valid regulations issued by the Attorney-General. After recall or cancellation of the list, the Board must exercise its own independent discretion after a fair hearing.

The Court said (*per* Clark J.): " . . . New grounds were alleged, on information and belief, for attacking the administrative refusal to suspend deportation.[1] The principal ground is that on October 2,

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[1] The first ground was that " in all similar cases the Board of Immigration Appeals has exercised favorable discretion and its refusal to do so herein constitutes an abuse of discretion." This is a wholly frivolous contention, adequately disposed of by the Court of Appeals. 206 F. 2d 897, 901. Another allegation charged " that the Department of Justice maintains a confidential file with respect to [Joseph Accardi]." But at no place does the petition elaborate on this charge, nor does the petition allege that discretionary relief was denied because of information contained

1952—after the Acting Commissioner's decision in the case but before the decision of the Board of Immigration Appeals—the Attorney General announced at a press conference that he planned to deport certain 'unsavory characters'; on or about that date the Attorney General prepared a confidential list of one hundred individuals, including petitioner, whose deportation he wished; the list was circulated by the Department of Justice among all employees in the Immigration Service and on the Board of Immigration Appeals; and that issuance of the list and related publicity amounted to public prejudgment by the Attorney General so that fair consideration of petitioner's case by the Board of Immigration Appeals was made impossible. Although an opposing affidavit submitted by government counsel denied 'that the decision was based on information outside of the record' and contended that the allegation of prejudgment was 'frivolous,' the same counsel repeated in a colloquy with the court a statement he had made at the first habeas corpus hearing—'that this man was on the Attorney General's proscribed list of alien deportees.'

" . . . The crucial question is whether the alleged conduct of the Attorney General deprived petitioner of any of the rights guaranteed him by the statute or by the regulations issued pursuant thereto.

" Regulations[1] with the force and effect of law[2] supplement the bare bones of § 19 (c). The regulations prescribe the procedure to be followed in processing an alien's application for suspension of deportation. Until the 1952 revision of the regulations, the procedure called for decisions at three separate administrative levels below the Attorney General—hearing officer, Commissioner, and the Board of Immigration Appeals. The Board is appointed by the Attorney General, serves at his pleasure, and operates under regulations providing that: 'In considering and determining . . . appeals, the Board of Immigration Appeals shall exercise such discretion and power conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case. The decision of the Board . . . shall be final except in those cases

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in a confidential file. Although the petition does allege that " because of consideration of matters outside the record of his immigration hearing, discretionary relief has been denied," this allegation seems to refer to the " confidential list " discussed in the body of the opinion. Hence we assume that the charge of reliance on confidential information merely repeats the principal allegation that the Attorney General's prejudgment of Accardi's case by issuance of the " confidential list " caused the Board to deny discretionary relief.

[1] The applicable regulations in effect during most of this proceeding appear at 8 CFR, 1949, Pts. 150 and 90 and 8 CFR, 1951 Pocket Supp., Pts. 150, 151 and 90. The corresponding sections in the 1952 revision of the regulations, promulgated pursuant to the Immigration and Nationality Act of 1952, may be found at 8 CFR, Rev. 1952, Pts. 242–244 and 6; 8 CFR, 1954 Pocket Supp., Pts. 242–244 and 6; 19 Fed. Reg. 930.

[2] See *Boske* v. *Comingore*, 177 U. S. 459 (1900); *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 155 (1923); *Bridges* v. *Wixon*, 326 U. S. 135, 150–156 (1945).

reviewed by the Attorney General . . .' 8 CFR, 1949, § 90.3 (c). See 8 CFR, Rev. 1952, § 6.1 (d) (1). And the Board was required to refer to the Attorney General for review all cases which:

> '(a) The Attorney General directs the Board to refer to him.
>
> '(b) The chairman or a majority of the Board believes should be referred to the Attorney General for review of its decision.
>
> '(c) The Commissioner requests be referred to the Attorney General by the Board and it agrees.' 8 CFR, 1949, § 90.12. See 8 CFR, Rev. 1952, § 6.1 (h) (1).

"The regulations just quoted pinpoint the decisive fact in this case: the Board was required, as it still is, to exercise its own judgment when considering appeals. The clear import of broad provisions for a final review by the Attorney General himself would be meaningless if the Board were not expected to render a decision in accord with its own collective belief. In unequivocal terms the regulations delegate to the Board discretionary authority as broad as the statute confers on the Attorney General; the scope of the Attorney General's discretion became the yardstick of the Board's. And if the word 'discretion' means anything in a statutory or administrative grant of power, it means that the recipient must exercise his authority according to his own understanding and conscience. This applies with equal force to the Board and the Attorney General. In short, as long as the regulations remain operative, the Attorney General denies himself the right to sidestep the Board or dictate its decision in any manner.

"We think the petition for habeas corpus charges the Attorney General with precisely what the regulations forbid him to do: dictating the Board's decision. The petition alleges that the Attorney General included the name of petitioner in a confidential list of 'unsavory characters' whom he wanted deported; public announcements clearly reveal that the Attorney General did not regard the listing as a mere preliminary to investigation and deportation; to the contrary, those listed were persons whom the Attorney General 'planned to deport.' And, it is alleged, this intention was made quite clear to the Board when the list was circulated among its members. In fact, the Assistant District Attorney characterized it as the 'Attorney General's proscribed list of alien deportees.' To be sure, the petition does not allege that the 'Attorney General ordered the Board to deny discretionary relief to the listed aliens.' It would be naive to expect such a heavy-handed way of doing things. However, proof was offered and refused that the Commissioner of Immigration told previous counsel of petitioner, 'We can't do a thing in your case because the Attorney General has his [petitioner's] name on that list of a hundred.' We believe the allegations are quite sufficient where the body charged with the exercise of discretion is a nonstatutory board composed of subordinates within a department headed by the individual who formulated, announced, and circulated such views of the pending proceeding.

" It is important to emphasize that we are not here reviewing and reversing the *manner* in which discretion was exercised. If such were the case we would be discussing the evidence in the record supporting or undermining the alien's claim to discretionary relief. Rather, we object to the Board's alleged *failure to exercise* its own discretion, contrary to existing valid regulations.

" If petitioner can prove the allegation, he should receive a new hearing before the Board without the burden of previous proscription by the list. After the recall or cancellation of the list, the Board must rule out any consideration thereof and in arriving at its decision exercise its own independent discretion, after a fair hearing, which is nothing more than what the regulations accord petitioner as a right.[1] Of course, he may be unable to prove his allegation before the District Court; but he is entitled to the opportunity to try. If successful, he may still fail to convince the Board or the Attorney General, in the exercise of their discretion, that he is entitled to suspension, but at least he will have been afforded that due process required by the regulations in such proceedings."

Jackson J., with whom Reed, Burton and Minton JJ. joined, dissented on the ground that the Board of Immigration Appeals was neither a judicial body nor an independent agency and that its decisions were in law those of the Attorney-General, in whom alone rested discretion to suspend deportation. He said: " We feel constrained to dissent from the legal doctrine being announced. The doctrine seems proof of the adage that hard cases make bad law.

" Peculiarities which distinguish this administrative decision from others we have held judicially reviewable must be borne in mind. The hearings questioned here as to their fairness were not hearings on which an order of deportation was based and which, under some limitations, may be tested by habeas corpus. *Ekiu* v. *United States*, 142 U. S. 651. Neither is this a case involving questioned personal status, as whether one is eligible for citizenship, which we have held reviewable under procedures for declaratory judgment and injunction. *McGrath* v. *Kristensen*, 340 U. S. 162.[2] Petitioner admittedly is in this country illegally and does not question his deportability or the validity of the order to deport him. The hearings in question relate only to whether carrying out an entirely legal deportation order is to be suspended.

" Congress vested in the Attorney General, and in him alone, discretion as to whether to suspend deportation under certain circumstances. We think a refusal to exercise that discretion is not reviewable on habeas corpus, first, because the nature of the power and discretion vested in the Attorney General is analogous to the power of pardon or commutation of a sentence, which we trust no one thinks is subject to judicial control; and second, because no legal right exists in petitioner by virtue of constitution, statute or common law to have a lawful order of deportation suspended. Even if petitioner proves himself eligible for suspension, that gives him no right to it as a matter of law but merely establishes a condition precedent to exercise of discretion by the Attorney General. Habeas corpus is to enforce legal rights, not to transfer to the courts control of executive discretion.

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[1] See the *Bilokumsky* and *Bridges* cases, *supra* [p. 359, n. 4.]

[[2] See *International Law Reports*, 1950, Case No. 67.]

" The ground for judicial interference here seems to be that the Board of Immigration Appeals did find, or may have found, against suspension on instructions from the Attorney General. Even so, this Board is neither a judicial body nor an independent agency. It is created by the Attorney General as part of his office, he names its members, and they are responsible only to him. It operates under his supervision and direction, and its every decision is subject to his unlimited review and revision. The refusal to suspend deportation, no matter which subordinate officer actually makes it, is in law the Attorney General's decision. We do not think its validity can be impeached by showing that he overinfluenced members of his own staff whose opinion in any event would be only advisory.

" The Court appears to be of the belief that habeas corpus will issue to review a decision by the Board. It is treating the Attorney General's regulations as if they vested in the Board final authority to exercise his discretion. But, in our view, the statute neither contemplates nor tolerates a redelegation of his discretion by the Attorney General so as to make the decision of the Board, even if left standing by him, final in the sense of being subject to judicial review as the Board's own decision. Even the Attorney General was not entrusted with this discretion free of all congressional control, for Congress specifically reserved to itself power to overrule his acts of grace. 54 Stat. 672, 8 U. S. C. (1946) § 155 (c), as amended, 8 U. S. C. (Supp. V) § 155 (c). It overtaxes our naïveté about politics to believe Congress would entrust the power to a board which is not the creature of Congress and whose members are not subject to Senate confirmation.

" Cases challenging deportation orders, such as *Bridges* v. *Wixon*, 326 U. S. 135, whatever their merits or demerits, have no application here. In cases where the question is the validity of a deportation order, habeas corpus will issue at least to review jurisdictional questions. In those cases, also, the petitioner has a legal right to assert, *viz.*, a private right not to be deported except upon grounds prescribed by Congress. Neither the validity of deportation nor a private right is involved here.

" Of course, it may be thought that it would be better government if even executive acts of grace were subject to judicial review.

But the process of the Court seems adapted only to the determination of legal rights, and here the decision is thrusting upon the courts the task of reviewing a discretionary and purely executive function. Habeas corpus, like the currency, can be debased by over-issue quite as certainly as by too niggardly use. We would affirm and leave the responsibility for suspension or execution of this deportation squarely on the Attorney General, where Congress has put it."

[Reports: 347 U.S. 260, 98 L.Ed. 681, 74 Sup. Ct. 499.]

NOTE.—The above case is noted in *George Washington Law Review*, 22 (1954), p. 756; *Illinois Bar Journal*, 42 (1954), p. 657; *University of Florida Law Review*, 7 (1954), p. 328.

D—EXTRADITION

III.—Conditions of Extradition. Extraditable Crimes

Extradition—Conditions of—Absence of Extradition Treaty—Extraditable Offences—Fiscal Offences—Fiscal Offences Committed in Conjunction with other Offences—State Succession—Treaties—Extradition Treaties.

N. *v.* PUBLIC PROSECUTOR OF THE CANTON OF AARGAU.

Switzerland, Cour de Cassation. May 29, 1953.

THE FACTS.—N., a Swiss national, lived in Czechoslovakia during the years 1948 and 1949. During that time he obtained some 500,000 Czech crowns from various persons by means of promises that he would place the equivalent at their disposal abroad, knowing that he would never do so. On his return to Switzerland, he was sentenced in the Canton of Aargau for fraud, Czech law being applied. He now sought to obtain the annulment of the conviction. It was contended on his behalf that he could be sentenced for the offences committed in Czechoslovakia only if, as an alien, he could be extradited for the offences in question, and that an alien could not have been extradited, first, because there was no extradition treaty, and secondly, because the offences were fiscal in character.

Held: that the conviction must stand. Swiss law permitted extradition in the absence of a treaty. The fact that an extraditable offence also constitutes a fiscal offence did not exclude extradition.

The Court said: "Under Article 6 (1) of the Swiss Penal Code a Swiss national can be prosecuted in Switzerland for an offence committed abroad only if Swiss law permits extradition for the offence in question; for punishment in Switzerland is a substitute for the extradition of Swiss nationals and cannot, unless Swiss nationals are to be placed in a position inferior to that of aliens, take place in cases in which Swiss law would prohibit the extradition of the alien.

"Switzerland has not concluded an extradition treaty with

Czechoslovakia. Moreover, the Extradition Treaty between Switzerland and Austria-Hungary cannot, as the Federal Council stated in 1920 in reply to a request for extradition, be applied without more to Czechoslovakia as successor State (BBl., 1921, II, 350). However, that is immaterial, as is also the question whether the declaration of reciprocity given by the Czechoslovak Government to the Federal Council in that case must be regarded as still valid. Article 1, para. 1, of the Federal Law of January 22, 1892, concerning Extradition empowers the Federal Council to grant extradition to States with whom no extradition treaty has been concluded, in exceptional cases even without reserving the right to reciprocal treatment, if the conditions laid down in the Law are satisfied. Whether it does so is a matter for its discretion, taking into account the interest of Switzerland in ridding the country of criminal or suspect aliens (BBl, 1890, III, 329). What use it would make of its discretion in a case like the present cannot be foreseen. However, for the purpose of Article 6 (1) of the Penal Code, the decisive question is whether Swiss law permits the extradition. Under Article 3 (22) of the Law concerning Extradition, fraud is extraditable. Even if the acts in question under Czech law also constitute fiscal offences, extradition may be granted. Admittedly, extradition may not, in conformity with Article 11, para. 1, of the Extradition Law, be granted for violation of fiscal laws. However, as was decided in *In re Wyrobnik*, A.T.F. 78 (1952), I, p. 245 [*International Law Reports*, 1952, Case No. 86], the fact that an extraditable offence also constitutes a fiscal offence does not prevent extradition for the former offence; in such a case extradition is granted on condition that the fiscal offence is neither punished nor considered in aggravation of sentence."

[Report: *Arrêts du Tribunal Fédéral Suisse*, vol. 79 (1953), IV, pp. 49–51.]

Extradition—Conditions of—Principle of Reciprocity—Identity of Extradition and Prosecution—Extradition Limited to Crimes—Exclusion of Misdemeanours—Extradition Granted in respect of Crime—Accused Subsequently Convicted of Misdemeanour.

AUSTRIAN EXTRADITION (No. 2) CASE.

Austria, Supreme Court. July 10, 1953.

THE FACTS.—An ordinance of the Austrian Ministry of Justice provided that extradition between Austria and Germany was to be governed by the principle of reciprocity and that mutual requests for extradition between the two countries were to be granted only in respect of crimes, and not in respect of misdemeanours. The accused, an Austrian citizen, was extradited by Germany in pursuance of an Austrian request which named the alleged offences as being fraud and larceny, both " crimes " within the meaning of the above ordinance. He was subsequently convicted by an Austrian court of embezzlement, which Austrian law qualifies as a misdemeanour and not as a crime.

Held: that the conviction must be quashed as violating the principle of reciprocity.

The Court said: "In accordance with the ordinance of the Federal Ministry of Justice of May 27, 1946, concerning judicial assistance in relations with foreign countries, and extradition proceedings, extradition to and from Germany is governed by the principle of reciprocity. Extradition may be granted only in respect of an offence which is a crime according to German law. Accordingly, foreign nationals who have committed misdemeanours can neither be extradited nor punished in Austria. By virtue of the principle of reciprocity offences committed by an Austrian national in a foreign country, which are qualified as misdemeanours by Austrian law, do not constitute extraditable offences, even if—as in the present case—they are qualified as crimes by German law. In the present case the extradition of the accused had been granted in respect of the crimes of fraud and larceny. When the warrant of arrest was issued the offence was therein described as fraud. It was not permissible to charge the accused subsequently with the misdemeanour of embezzlement and then to convict him of the latter offence, because in so doing the Court violated the generally recognized principle of reciprocity which applies to the law of extradition and as such forms part of federal law. While it is true that this principle does not preclude a prosecution and punishment of the accused for an offence which is no longer to be judged from the standpoint of the offence as contained in the request for extradition, the offence must, even as viewed from that different angle, constitute one of the offences in respect of which extradition has been granted in accordance with the principle of reciprocity. A conviction is not permissible if the offence, as a result of a different legal qualification, now constitutes an offence which is not extraditable. As in the matter of extradition between Western Germany and Austria extradition cannot be granted in respect of misdemeanours, the conviction of the accused for the misdemeanour of embezzlement is null and void."

[Report: ÖJZ, 8 (1953), p. 611.]

Extradition—Conditions of—Requirement of Double Criminality—Request for Extradition of Convicted Offender—Weight to be Attached to Conviction by Court of Requesting Country—The Law of Austria.

AUSTRIAN EXTRADITION (NO. 1) CASE.

Austria, Supreme Court. March 20, 1953.

THE FACTS.—The Federal Republic of Germany requested the extradition from Austria of a person who had been convicted of larceny and fraud by a German court and who had subsequently escaped from prison before the expiration of his sentence. On behalf of the accused it was contended that on a proper interpretation of Austrian law he would—if tried in Austria—have been convicted of larceny only, and not larceny and fraud,[1] and that his extradition would therefore violate the principle of double criminality.

Held: that as on a proper interpretation of Austrian law the accused would only have been convicted of larceny, his extradition for the two offences would violate the principle of double criminality. This principle applied to suspected and convicted criminals alike, and extradition must accordingly be refused.

The Court said: "According to the general rules of the international law of extradition it is a prerequisite of any extradition that the offence in respect of which extradition is requested shall be an extraditable criminal offence not only by the law of the requesting State, but also by the law of the requested State (principle of double criminality). The fact that the offence has been found by a court of the requesting State to be an extraditable criminal offence does not suffice to justify extradition, nor does such finding bind the authorities of the requested State in any way. The aforementioned rules apply especially to extradition proceedings between Austria and Germany, with regard to which the relevant provisions of Austrian and German law do not contain any limitation of the rule that the offence must be a crime in both countries. The Court of Appeal of Innsbruck (Austria) should not, therefore, have granted the extradition of the appellant for the purpose of serving a sentence imposed for larceny as well as for what is, according to Austrian law, an 'unpunishable supplementary deed'."

[Report: ÖJZ, 8 (1953), p. 465.]

Extradition—Conditions of—Extradition in Absence of Treaty.

Re TRIBBLE.

Venezuela, Federal Court. May 26, 1953.

THE FACTS.—The Federal Court was asked to approve a request which was to be directed by Venezuelan authorities to Panama for the extradition of William David Tribble, an American national, on a charge of homicide. There was no extradition treaty with Panama.

Held: that the request for extradition should proceed. After finding that the request for extradition conformed to the requirements of Venezuelan law, the Court continued: "Although there is no extradition treaty with the Republic of Panama, this fact need not impede the submission of an extradition request, for, in conformity with the Public Law of Nations, friendly States recognize a reciprocal obligation to surrender offenders who have taken refuge in their respective countries."[1]

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[1] The accused had stolen a camera and had subsequently sold it to a dealer to whom, at the latter's request, he had given a certificate that the camera was his own property and that he had not obtained possession thereof by means of a criminal offence. According to Austrian law the deception of the dealer by means of the false certificate constituted a so-called "unpunishable supplementary deed".

[Report: *Gaceta Forense* (2a Étapa), No. 1 (April–August 1953), p. 12.]

Extradition—Extraditable Offences—Facts Constituting Both Extraditable and Non-Extraditable Offences—The Law of Switzerland.

In re REDJOFF.

Switzerland, Federal Tribunal. March 4, 1953.

THE FACTS.—On September 29, 1952, the Belgian Legation in Berne requested the extradition of one Stoyan Redjoff, a stateless person. The request referred to a warrant for the arrest of Redjoff, issued by the Court of first instance of Brussels and charging him, first, with forging bills in the name of a non-existent Swiss firm, and secondly, with forging certificates of origin of goods, all with the intent to evade exchange control legislation. It was now contended on behalf of Redjoff that he could not be extradited, since his offences were fiscal in character and fiscal offences were not extraditable. Alternatively, it was contended that extradition should be granted only subject to the condition that no punishment be imposed for offences against exchange control legislation and offences not punishable under Swiss law, and that Redjoff should not be handed over to a third State.

Held: that extradition must be granted, subject to the following conditions: (1) that Redjoff be not prosecuted for acts covered by the offences against Belgian exchange control legislation, nor for offences of foregery committed prior to June 1, 1950, when such offences became punishable in Switzerland under ordinary law and not under special legislation; (2) that the offences concerning the certificates of origin, which are punishable in Switzerland under special legislation not referred to in the list of extraditable offences enumerated in the Swiss-Belgian Extradition Treaty, be not punished or taken into account as an aggravating circumstance.

The Court said: "The Court does not have to decide whether Redjoff is guilty. It merely considers whether he is sought for acts constituting offences covered by the Extradition Treaty between Switzerland and Belgium in both Swiss and Belgian law. In that connection it is bound by the statement of facts contained in the warrant of arrest on which the request for extradition is based. On the other hand, it is free to determine whether the conditions for extradition are satisfied."

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[1] Similar judgments were handed down by the Federal Court in the following extradition cases: *Re Serra* (*Gaceta Forense* (2a Étapa), No. 1 (April-August 1953), p. 15 (May 15, 1953)); *Re Téllez Zea* (*ibid.*, No. 2 (September-December 1953), p. 5 (September 29, 1953)).

The Court found, first, that the forgery of the bills constituted an offence under Article 251 of the Swiss Penal Code. Secondly, the Court held that the forgery of certificates of origin constituted an offence under special legislation in Switzerland. That offence was not included in the list of offences set out in Article 2 of the Extradition Treaty between Switzerland and Belgium, and accordingly could not give rise to extradition. Thirdly, the Court found that the forgery of bills and other documents for use in international clearing was until 1950 an offence covered not by the general provisions of Article 251 of the Swiss Penal Code, but by special legislation. Such an offence could not give rise to extradition under the Extradition Treaty. On the other hand, since 1950, the forgery of bills and other documents for use in international clearing was an offence punishable also under Article 251 of the Swiss Penal Code, and as such it was an extraditable offence.

The Court continued: " There remains to be examined the question whether the acts which the accused is alleged to have committed constitute one of the offences enumerated in Article 2 of the Extradition Treaty or come under Belgian law.

" The accused does not deny that these acts come within the definition contained in Articles 193, 196 and 197 of the Belgian Penal Code. But he contends that the forgeries with which he is charged are absorbed by the offence under the Decree-Law of October 6, 1944, concerning exchange control, and that the latter is exclusively applicable. That contention calls for the following observations :

" When an offence giving rise to extradition has been committed coincidentally with an offence not so giving rise to extradition, this Court grants extradition for the first on condition that the second shall not be punished and shall not be regarded as a ground for aggravating sentence. The same is true if the two offences are connected. On the other hand, the position is different where the offence not giving rise to extradition comprises all the elements of the offence giving rise to it, and thus absorbs the latter. For instance, forgery of documents is absorbed by the special offence concerning foreign exchange if the latter necessarily comprises such forgery, *i.e.* if it could not be committed without it. If it is doubtful whether there is such absorption, extradition must be granted. In fact, it is not the function of the Court called upon to consider the advisability of extradition to resolve difficult questions of the interpretation of foreign law; if doctrine and jurisprudence do not lead it to definite conclusions it must grant extradition, and leave the criminal court of the demanding State to decide these questions." [The Court then found that, in the case before it, it must leave the question to the Belgian criminal court.]

"The handing over of an extradited person to a third State is prohibited by Article 7 of the Extradition Law [and] it is for the Federal Council to bring this to the attention of the Belgian authorities."

[Report: *Arrêts du Tribunal Fédéral suisse*, 1953, I, p. 34.]

V.—Political Crimes

Extradition—Political Offences—Intelligence with the Enemy—Franco-Belgian Extradition Treaty of 1874—French Extradition Law of 1927.

Re SPIESSENS.

France, Court of Appeal of Colmar. May 7, 1953.

THE FACTS.—The Belgian Government requested the French Government to extradite Spiessens, a Belgian national, who had been convicted by the Military Tribunal of Antwerp of the offence of "intelligence with the enemy". If judged under French law, the offence would have been a "crime against the external security of the State" and as such a political offence, which, according to the Franco-Belgian Extradition Treaty of August 15, 1874, and the French Extradition Law of March 10, 1927, was not extraditable. By an Exchange of Notes between the French and Belgian Governments (the Notes being dated, respectively, December 17, 1946, and January 10, 1947) it was agreed that mutual extradition should be granted in respect of offences of the kind here referred to. These Notes, however, had not been ratified or published in France, and it was accordingly contended on behalf of Spiessens that they were inapplicable and that extradition should be refused in accordance with the Franco-Belgian Extradition Treaty of 1874 and the French Extradition Law of 1927, on the ground that the conviction had been obtained for a political offence which was not extraditable. On behalf of the prosecution it was contended that the Notes exchanged between the two Governments must take precedence of the French Extradition Law of 1927 and that Spiessens should accordingly be extradited.

Held: that the French Extradition Law of 1927 must be applied and the request for extradition refused.

The Court said: "The facts on the basis of which Spiessens has been convicted in Belgium would constitute offences not contained in the Franco-Belgian Extradition Treaty of August 15, 1874. These offences are offences of a political character within the meaning of Article 3 of the Treaty and Article 5 (2) of the Law of March 10, 1927, and are therefore not extraditable. The provisions of the Decree-Laws of June 17, 1938, and July 29, 1939, and of Article 84 of the Penal Code, which specify that crimes against the external security of the State shall be regarded as common crimes and punished by the penalties applicable to the latter do not deprive these offences of their political character. In fact, the enactments referred to assimilate such offences to common crimes only in so far as concerns the punishment to be inflicted. The Law of March 10, 1927, must therefore apply. It follows from the wording of Article 1 of this Law that only a treaty can derogate from its provisions. The agreement on reciprocity between the Belgian and French Governments, which derives from the Notes exchanged on December 17, 1946, and January 10, 1947, respectively, cannot be regarded as a treaty. The request of the Belgian Government for Spiessens' extradition must therefore be refused."

[Report: *Dalloz*, 1953, *Jurisprudence*, p. 604.]

NOTE.—See also *Re Rodriguez*, decided by the Court of Appeal of Paris on April 22, 1953, where it was *held* that the participation of a Spanish national as a member of the Republican Army in the Spanish Civil War must be regarded as being "connected" with a political offence within the meaning of the Franco-Spanish Extradition Treaty of December 14, 1874, and that a request by the Spanish Government for his extradition must therefore be refused. [Report: *Dalloz*, 1954, *Sommaires*, p. 6.]

Extradition—Political Offences—Whether Prohibition of Extradition Applicable to Persons Charged with Common Crime—Relevance of Political Situation in Requesting State—Claim to Asylum in Requested State—Whether Claim to Asylum Overrides Duty of Requested State to Extradite—The Law of Germany.

EXTRADITION (ECUADORIAN NATIONAL) CASE.

German Federal Republic, Federal Supreme Court. January 21, 1953.

THE FACTS.—The Republic of Ecuador requested the Federal Republic of Germany to extradite the appellant, an Ecuadorian citizen, who was alleged to have committed certain criminal offences involving fraud. The appellant contended that, notwithstanding that the crimes with which he was charged in Ecuador were not political offences, he was liable, having regard to the political situation in Ecuador, to be treated as if he were a political offender, and that he was therefore entitled to invoke Article 16 (2) (2) of the Constitution of the Federal Republic of Germany which provides that "politically persecuted persons are entitled to asylum."

Held: that the relevant provision of the German Extradition Law which prohibited the extradition of political offenders was not limited to persons charged with political offences in the strict sense, but applied equally to persons who were in danger of political persecution in the requesting State, and that such persons were entitled to claim the right of asylum in the Federal Republic.

The Court said: " The right [*i.e.*, the right of asylum postulated in Article 16 (2) (2) of the Constitution] is limited only by the general rules of international law which, by virtue of Article 25 of the Constitution, are declared to be binding as forming part of federal law. International law does not know of any general rule imposing a duty to extradite. On the contrary, the right of asylum of politically persecuted persons who are in danger of suffering injury to life and limb in their home country—with the exception of persons charged with attempts on the life of another—is recognized by the laws of many foreign States. The Republic of Ecuador, likewise, has enacted legislation which grants the right of asylum to political refugees. The Convention on the Status of Refugees, of July 28, 1951, which is based on the Declaration of Human Rights of December 10, 1948, provides that those persons shall, *inter alia*, be deemed to be refugees who, by reason of well-founded fear of persecution on account of their political views, are outside the territory of the country of which they are nationals and who cannot claim the protection of that country or do not wish to claim its protection on account of their fear of persecution. It follows that general international law does not limit the right of asylum to political offenders or to persons whose offence is connected with a political crime. International law cannot therefore restrict the unlimited right of asylum vouchsafed by Article 16 (2) (2) of the Constitution. . . ."

[Report: NJW, 6 (1953), p. 392.]

Extradition—Political Offences—Fiscal Offences—Fiscal Offences Committed in Conjunction with Other Offences—State Succession —Treaties—Extradition Treaties.

See p. 363 (*N.* v. *Public Prosecutor of the Canton of Aargau*).

VI.—Miscellaneous

Extradition—Miscellaneous—Trial of Extradited Person for Non-Extraditable Offences—Right of Asylum.

SAKSENA *v.* THE STATE.

India, High Court of Rajasthan. November 6, 1950.

(Ranawat J.)

THE FACTS.—The accused was arrested in Uttar Pradesh in pursuance of a warrant issued under s. 7 of the Indian Extradition Act in respect of offences under ss. 388 and 420 of the Penal Code alleged to have been committed by him in Rajasthan. He was brought before a special magistrate in Rajasthan to stand his trial under ss. 388 and 420, as well as under s. 161 of the Penal Code. The accused objected to trial under s. 161 as he was extradited from

Uttar Pradesh, he contended, only for the trial of offences under ss. 388 and 420. The case came to the Sessions Judge of Jaipur, who referred it to this High Court.

Held: that there was no legal bar to the trial of the accused in the State of Rajasthan for an offence under s. 161 of the Penal Code.

The Court said: " The main question for determination in this case is whether the accused, who is extradited under the provisions of Section 7 of the Indian Extradition Act from the Province of Uttar Pradesh for trial under Sections 388 and 420 [of the] Penal Code, can be tried in Rajasthan for an offence under Section 161, which is an offence not mentioned in the first schedule of the Indian Extradition Act relating to extradition offences.

" In an article published in the *American Law Review* in 1876, written by Judge Lowell of the United States Court of Boston . . . it has been said that the rule is that the person whose extradition has been granted cannot be prosecuted and tried except for the crime for which his extradition has been obtained. Reference to this article has also been made in the judgment in *United States* v. *William Rauscher* ((1886), 119 U.S. 417). Mr. David Dudley Field, in his draft of an outline for an International Code published about the same time, adopts the same principle (para. 327, p. 122). There was a long-standing controversy on this question between Great Britain and the United States of America which was set at rest by the decision in *Rauscher's* case. The United States insisted that once a person has been fully extradited he became for all purposes subject to the local jurisdiction, but the rule contended for by Great Britain was to the contrary [and] was finally affirmed in *United States* v. *William Rauscher* and has since been expressly incorporated in the Extradition Treaty entered into between the two countries in 1890. This principle has been applied in a number of cases in various countries, *e.g.*, *Buck* v. *The King*, (1919) 55 S.C.R. 133 (Canada), . . .

" It may be observed here that the decision in *Rauscher's* case mostly revolves on the interpretation of the Treaty between Great Britain and the United States, though in support of the judgment some extracts from articles on international law by eminent jurists have also been referred to. Such opinions can be helpful only in cases where there is no municipal law on the point. But where there is a specific provision of municipal law, opinions of experts cannot be regarded as overriding the provisions of municipal law. According to Section 177 of the Criminal Procedure Code all offences committed or alleged to have been committed by an accused person in the limits of the State of Rajasthan, whether extraditable or not, are to be tried by a competent Court in the State of Rajasthan irrespective of the fact that the accused was extradited only for the trial of extraditable offences.

"Regarding the point whether the accused had any right of asylum vested in him at the time of his extradition, which cannot be taken away from him, the learned Government Advocate has referred to the case of *Emperor* v. *Vinayaka Damodar*, 10 Ind. Cas. 956 (Bom.). In that case the accused after his arrest escaped and went over to a foreign country, but he was again arrested by the Indian police, perhaps in contravention of the laws of that country, and at the trial a plea was raised by the defence that as the arrest of the accused in the foreign country was illegal, the accused could not be tried for the offences alleged to have been committed by him prior to his illegal arrest, because such a trial infringed the right of asylum acquired by the accused by his entry into a foreign country.

"The only distinction between the case reported in *Emperor* v. *Vinayaka Damodar*. . . and this case is that in that case there was no question of extradition, whereas in the present case extradition of the accused has been obtained from another State, but, as has already been discussed above, the fact that the accused has been extradited to Rajasthan does not make the position of the accused in any way different from [what] it would otherwise have been, and for the purpose of the trial of the accused the opinion expressed in that judgment will hold good. No right of asylum is available to the accused so as to bar his trial in Rajasthan for non-extraditable offences."

[Report: A.I.R., 1953, Rajasthan 12.]

F—MISCELLANEOUS

Individual in International Law—Passport—Issue and Renewal of—Nature of Passport—Whether a Contractual Document—Whether Holder Entitled to Renewal—The Law of South Africa.

FELLNER *v.* DÖNGES, N.O.

South Africa, Supreme Court, Transvaal Provincial Division.

(Murray J.)
April 2, 1953.

Supreme Court, Transvaal Provincial Division (*Full Bench*).

(Neser and de Wet JJ., and Ludorf A.J.)
December 10, 1953.

FELLNER *v.* MINISTER OF THE INTERIOR.

South Africa, Supreme Court, Appellate Division. September 9, 1954.
(Centlivres C.J. Greenberg, Schreiner, Hoexter and Fagan JJ.A.)

THE FACTS.—Mrs. Fellner, a South African citizen by birth, was married to a man naturalized in the Union. She applied for, and was granted, a passport on September 1, 1945. On one of the pages of this document a series of regulations were printed, containing, *inter alia*, the following provision:

"3. Passports are valid for five years from date of issue, unless otherwise endorsed, and are renewable for any period of from one to five years. A passport is not valid beyond ten years from the original date of issue. The fee for renewal is 2s. per year. A form of renewal must be completed. If there be no further space for visas, a new passport must be obtained."

In September 1952, some considerable time after the end of the first five-year period of validity of her passport, Mrs. Fellner applied to the passport office for its renewal, as she wished to leave the Union for a while. She completed the application form given her, and handed over the 8s. required as a fee for the revalidation of her present passport until August 1955. The Minister of the Interior, however, refused, without giving reasons, to renew the passport, and the money was refunded to Mrs. Fellner.

In *Sachs* v. *Dönges, N.O.*[1] (1950 (2) S.A. 265 (A.D.)), three Judges, out of the Full Bench of five which constitutes the Appellate Division of the South African Supreme Court, had refused to grant an order to the Minister of the Interior requiring Sachs to surrender his passport to the authorities, after the Minister had purported to revoke the passport. Two of the Judges of the majority of three gave, as one of the reasons for their decision, the opinion that the issue of a passport established a contractual relationship between the Crown and the holder, and, therefore, it could not be revoked at the will of the Minister. Mrs. Fellner, relying on this decision, applied to Murray J., of the Transvaal Provincial Division of the Supreme Court, for an order directing the Minister to renew her passport, in terms of reg. 3 (*supra*), on payment of the required sum.

Held: that the order should not be granted. In the course of his judgment Murray J. said:

"It seems to me that I am bound to follow the judgment of the Appellate Division and to accept the position, from the concurrence of Schreiner, J.A., with the judgment of Watermeyer, C.J., that a contractual relationship was created in 1945 between applicant and the Crown. In return for her payment of £1 she obtained a document of value, which the Crown undertook in condition 3 in the first place should have validity for five years (unless of course she mutilated it or caused unauthorized endorsements or additions to be made thereon). But in addition the Crown as part of this contract gave her a right of renewal—clearly exercisable at her option and not at that of the Crown—and undertook that she could on payment of the prescribed renewal fee extend the validity of the same document, and in consequence use it so as to enjoy such privileges as it connoted, for a further period of one to five years. [But] after the passport had expired on August 31, 1950, the applicant had no right to claim its renewal, not having notified the respondent before that date of the exercise of her right of renewal."

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[1] See *Annual Digest*, 1950, Case No. 7.

Mrs. Fellner appealed against this decision to the Full Bench of the Transvaal Provincial Division.

Held: that the appeal must fail. The Court, again assuming that it was bound by *Sachs'* case, said (*per* Neser J.):

" Though the regulations [printed in the passport] may have the result that the passport could not be called up and cancelled by respondent during a period of five years it was not in my opinion an undertaking by respondent that he would on application renew the passport. The words ' are renewable for any period of from one to five years ' (*supra*, reg. 3) in my opinion refer to passports and not to the rights of holders of passports; officials were thereby informed that passports could be renewed for the periods stated and it was not intended thereby to confer on the holder of a passport the right at his option to renew it for such periods."

On appeal to the Appellate Division of the Supreme Court,

Held (Schreiner J. dissenting): that the decisions of the Courts below must be affirmed, though for somewhat different reasons. *Sachs* v. *Dönges, N.O.* (*supra*) was not authoritative on the point that the issue of a passport established a contractual relationship between the Crown and the holder. The issue of a passport was an executive act, and, as far as renewal was concerned, the Crown could not fetter by contract its future executive action.

Much of the attention of the Court was directed to a review of *Sachs'* case, in circumstances irrelevant to this report, as the point at issue was the definition of *ratio decidendi* and the application of the *stare decisis* rule in South African law. For present purposes it sufficed to say that the majority of the Court, while still upholding the actual decision in *Sachs'* case, did not feel themselves bound by the view, expressed by two of the Judges in that case, that the issue of a passport established a contractual relationship between Crown and holder. On the true nature of this relationship Centlivres C.J. said:

" It seems to me obvious that the so-called ' Passport Regulations ' are incorporated into the passport, which is issued, purely for the purpose of information and not for the purpose of prescribing the conditions of a contract. The relevant regulation in the present case is reg. 3. In the context of the regulations read as a whole I can see no reason why that regulation should not be regarded as having been inserted purely for the purpose of giving information to the holder of the passport. The statement in reg. 3 that ' passports are valid for five years from the date of issue, unless otherwise endorsed ' simply defines the period for which a passport is valid when it is not otherwise endorsed . . . There are no doubt reasons of State why a passport should be available for use for a limited period. Such a statement does not in my opinion justify an inference that the issuing of a passport is a contractual act between the State and the holder of the passport: it simply informs the holder that he cannot use the passport for longer than a specified period . . . I am unable to read reg. 3 as compelling the Crown to renew a passport in every case excepting where it was originally obtained through fraud or the holder has ceased to be a South African citizen. If the regulation is read in this compelling sense, then it would follow that the Crown would be bound to renew the passport even although the holder has, since the passport was issued, proved himself to be a disreputable character. There may be grave reasons of State why a passport should not be renewed for travel to a particular country and yet, if reg. 3 is to be read in the sense contended for by the appellant, the Crown would be bound to renew it. I cannot persuade myself that the regulation should be read in this manner. I am therefore of opinion that the regulation means that instead of applying for a new passport, the holder of a passport may apply for renewal and that it does not mean that the Crown is bound to renew it . . . In the present case the holder of the passport paid £1 for it: that was merely a fee charged by the Crown for services rendered and for supplying the booklet which constitutes the passport and is in no way different from fees customarily charged by the Crown in, for instance, registering deeds of transfer . . . The payment of the fee cannot, therefore, be regarded as evidence which establishes that the intention of the Crown and the holder of the passport was to create a legal obligation . . .

"In *Sachs'* case the dissenting Judges held that in any event the Crown cannot by contract fetter its future executive action . . . The granting of a renewal of a passport is, in my opinion, an executive act on the part of the Queen. Consequently even if the Crown had professed to fetter its future executive action by entering into a contract with the holder of a passport and agreed that the holder should have the right to require the Crown to renew his passport, such an agreement would not be binding on the Crown (see *Terrell* v. *Secretary of State for the Colonies and Another* ([1948] 2 Q.B. 482)).

"The conclusion at which I arrive is that when a passport is granted for a period of five years and the passport contains a provision that it is renewable for a period of one to five years on the completion of a form of renewal, there is no contract between the Crown, and the holder of the passport cannot by legal process compel the Crown to renew the passport. It is entirely within the discretion of the Crown whether to grant or renew a passport and it is not incumbent on the Crown to give any reasons for refusing to grant or renew a passport . . ."

Hoexter J.A. added the following remarks:

"I agree also that there never has been any contractual relationship between the Crown and the appellant with regard to her passport. The origin of the regulations governing the issue of passports is shrouded in mystery, but they appear to be merely Departmental regulations informing the public on the one hand under what conditions the Secretary of the Interior will consider applications for passports and giving instruction on the other hand to the officials of the Department. By issuing these regulations the Crown does not undertake to grant a passport if the applicant complies with the requirements stated in the regulations, but undertakes merely to consider applications made in accordance with those regulations. If an applicant for a passport does not comply with the regulations, his application will not be considered at all. If he does so comply, all that the Crown undertakes is to consider his application and, at its discretion, to grant or to refuse a passport. The issue of a passport does not alter the character of the regulations, and the regulations concerning the renewal of a passport merely inform the holder of the passport how he must apply for a renewal. Just as in the case of an application for a passport, so in the case of an application for renewal, the Crown undertakes no more than to consider the application, if it is made in compliance with the regulations, and, at its discretion, to grant or to refuse the renewal . . ."

[Reports: 1953 (2) S.A. 517 [T]; 1954 (1) S.A. 292 [T]; 1954 (4) S.A. 523 [A.D.].]

NOTE.—(1) Fagan J.A. concurred in the judgment of the Chief Justice. Greenberg J.A. appended a separate opinion, but his remarks were to the same effect as those reported above. Schreiner J.A. dissented on the ground that he felt obliged to follow the view expressed in *Sachs* v. *Dönges, N.O.* (*supra*) that the issue of a passport established a contractual relationship between the Crown and the holder, and that the terms of that contract were expressed in the regulations printed in the passport. Moreover, as stated in reg. 3 (*supra*), though the passport in question expired in five years, it was valid for ten, if renewed. Schreiner J.A. considered that the right of renewal, as he saw it, could be exercised any time before the expiration of those ten years. Therefore, in his opinion, the appeal should be allowed.

(2) The present case bears primarily upon a question of municipal constitutional law. However, as in some previous volumes, it has been considered useful to include certain cases of this nature in view of their international implications. Reference may be made in this connection to Article 13 (2) of the Universal Declaration of Human Rights, which provides as follows: "Everyone has the right to leave any country, including his own, and to return to his country."

PART VII

DIPLOMATIC AND CONSULAR INTERCOURSE AND PRIVILEGES

A—PERMANENT DIPLOMATIC ENVOYS

III.—Privileges and Immunities of

i.—Diplomatic Envoys and their Staff

Diplomatic Privileges and Immunities—Immunity from Jurisdiction—Limitation of—Inapplicability to Misdemeanours.

GREEK STATE *v.* X.

Greece, Court of First Instance of Athens. 1953.

THE FACTS.—The accused, a British subject, First Secretary of the Embassy of Great Britain at Athens, was charged with a misdemeanour. He pleaded diplomatic immunity, producing a certificate of the Ministry of Foreign Affairs as to his status.

Held: that the plea must be rejected. Diplomatic immunity does not extend to criminal acts of the kind with which the accused was charged.

The Court said: " Under Article 26 of the Code of Civil Procedure, all foreigners who enjoy in Greece the rights of diplomatic agents are exempt from the jurisdiction of the Greek courts. Nevertheless, by way of exception to that exemption, foreigners who enjoy such immunity are subject to the jurisdiction of the Greek courts when they are charged with a misdemeanour (*délit*). That is because according to international law the proceedings have no connection with the public character of the person entitled to immunity (Spiropoulos, *Public International Law*, 1949 edn., pp. 121 *sqq*; Papadapoulos, *Civil Procedure*, § 57, n. 13). Consequently, this Court is competent to hear the case brought before it. Moreover, the provisions of Article 2 of the Code of Criminal Procedure, which exempts the foreigners mentioned above—of whom the defendant is one—from the jurisdiction of the Greek criminal courts does not have the effect of depriving the act with which the defendant is charged of its character. That act, indeed, in spite of the above cited exemption of the person who committed it, is none the less reprehensible, and therefore the plea to the competence of the Greek courts put forward by the defendant . . . must be rejected as bad in law."

[Report: *Revue Hellénique de Droit International*, 7 (1954), p. 293.]

Diplomatic Immunities and Privileges—Immovable Property—Property not Used as Residence of Diplomatic Representative.

See p. 180 (*Republic of Latvia Case*).

ii.—Subordinate Members of the Diplomatic Staff

Diplomatic Immunities—Scope of—Embassy Staff—Assistant to Naval Attaché—Immunity of—The Law of Ceylon.

APPUHAMY *v.* GREGORY.

Ceylon, Supreme Court. October 8, 1953.

(Rose C.J.)

THE FACTS.—Gregory was an assistant to the Naval Attaché at the American Embassy in Colombo. A former personal servant of his, Appuhamy, sued him for the sum of Rs. 300, alleged to be due as wages. The defendant pleaded that he was immune from the jurisdiction of the local courts as he was attached to a foreign diplomatic mission. It was argued on behalf of Appuhamy that the plea of immunity must fail, as Gregory was not an actual member of the Ambassador's staff, being paid by the United States Navy. The Court of Requests, Colombo, upheld the claim to diplomatic immunity. On appeal to the Supreme Court,

Held: that the decision of the Court below must be affirmed.

The Chief Justice said: " The respondent at the trial raised the issue that he is a member of the staff of the American Embassy in Ceylon and is therefore immune from the jurisdiction of the Court of Requests. The test which appears to have been applied in the English cases and which I agree with the learned Commissioner (in the Court below) would seem to be applicable to the position now existing in Ceylon is that immunity from judicial process is extended not only to the person of the Minister or Ambassador but to his family, suite and servants. That was stated by McCardie J. in the case of *Assurantie Compagnie Excelsior* v. *Smith*[1] ((1923) 40 T.L.R. 105). On appeal Scrutton L.J. in the same case said, ' The Court must observe the rules of international comity which give diplomatic immunity from judicial process and must hold that the defendant was entitled to the immunity which he claimed on the ground that he was on the official staff of the Embassy carrying out official duties.'

" Mr. Nadarajah (for the appellant) contends that there would seem to be logical reasons for holding that a military or naval attaché should not be covered by this rule in that he is not one of the Ambassador's staff. That matter, however, appears to be decided by authority, and in the case of *Hemeleers-Shenley* v. *The Amazone*,

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[[1] See *Annual Digest*, 1923–1924, Case No. 173.]

Re the Amazone[1] ((1940) 1 A.E.R. 269) Slesser L.J. held that an assistant military attaché to the Belgian Embassy was entitled to the same immunity as a member of the Ambassador's staff, the test apparently being whether the attaché in question was performing duties in the Embassy to assist the Ambassador. If, therefore, in principle a military or naval attaché can be regarded as covered by the immunity, it seems to me that the same rule should apply to an assistant to an attaché provided that he in fact works in the Embassy.

"Now, the respondent, Mr. James Ashley Gregory, gave evidence, and there was no evidence called by the appellant in the lower Court to the contrary, that he is a clerk and assistant to the Naval Attaché in the American Embassy, Colombo. He stated that he is an American citizen on the staff of the American Embassy. In cross-examination he said 'I came to Ceylon on the 6th of November, 1950, and since then I have been attached to the American Embassy. I am paid by the U.S. Navy.' It seems to me that the fact that an attaché, or an assistant attaché or a clerk to an attaché, is not paid by the Embassy but is paid in fact by the United States Navy in whose employ he is does not remove him from the immunity, if in fact he is doing work on behalf of the Ambassador and is working in the Embassy."

[Report: (1953) 55 N.L.R. 235.]

C—RIGHT OF OTHER PERSONS TO PRIVILEGES AND IMMUNITIES

Diplomatic Privileges and Immunities—Member of Staff of Observer at the United Nations of a Non-Member of the United Nations—The Law of the United States of America.

PAPPAS *v.* FRANCISCI.

United States, Supreme Court of New York, Special Term, Kings County, Part V. February 6, 1953.

THE FACTS.—The defendant in this action moved to dismiss the complaint for lack of jurisdiction, on the ground that he was "a vice-consul of the Republic of Italy" and "a member of the Italian delegation to the United Nations" and that, as such, he was not subject to the jurisdiction of any State court. Both the plaintiff and the defendant submitted to the Court certain documents (referred to in the *Held* below) concerning the claimed immunity.

Held: that the motion to dismiss the complaint must be denied. The Department of State had denied the consular capacity of the defendant. Although, as a member of the staff of the Italian

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[1] See *Annual Digest*, 1938–1940, Case No. 162.]

Observer at the United Nations, he might be entitled to immunity under the International Organizations Immunities Act, the defendant had made no claim under that Act. He was not recognized by the United Nations as having diplomatic immunity.

The Court said: " The papers submitted hereon contain no proof to support defendant's claim of vice-consular status beyond affidavits by himself and his attorney. His attorney's affidavit refers to a letter in the possession of the plaintiff's attorneys wherein, it is alleged, the United States Department of State acknowledges its recognition of the said defendant as a consular officer and as a member of the Italian delegation. Defendant's attorney served a notice to produce the said letter on the argument of these motions.

" Plaintiff has submitted copies of letters from the chief of protocol of the said department dated, respectively, September 12 and 18, 1952. In addition he has submitted a copy of a letter dated September 4, 1952, from the United Nations Acting Chief of Protocol. Plaintiff's attorney denies possession or knowledge of any other correspondence on the subject.

" The Department of State letters clearly and unequivocally deny any recognition of defendant in a consular capacity or as an official with diplomatic status. However, the letter of September 12, certifies that the defendant has been registered with the department as a member of the staff of the Italian Observer at the United Nations and that he would apparently be entitled to the immunities of Public Law 291, Seventy-ninth Congress, 22 U.S.C.A. § 288d, which provides that such officers and employees shall be immune from suit and legal process relating to acts performed in their official capacities and falling within their function. Defendant makes no claim of immunity under the aforesaid Public Law.

" The letter of the Acting Chief of Protocol of the United Nations concerns the status of representatives of non-member nations maintaining observers' offices in New York. He states therein that ' The Headquarters Agreement does not mention the observers' category and up until now the agreement has not been interpreted to confer diplomatic immunity on such persons and/or members of their staff.' "

[Report: 119 N.Y.S. 2d 69.]

NOTE.—The above case is noted in *International and Comparative Law Quarterly*, 2 (1953), p. 644.

Diplomatic Privileges and Immunities—Officials of the United Nations—Privileged Character of Files of United Nations and of Information Derived Therefrom—Question Directed by Legislative Committee to Former Employee of the United Nations—The Law of the United States of America.

KEENEY *v.* UNITED STATES.

United States, District Court, District of Columbia. March 17, 1953.
Court of Appeals, District of Columbia Circuit. August 26, 1954.

THE FACTS.—The defendant was prosecuted for a contempt of Congress in that she had refused to answer the following question while she was testifying before a Special Subcommittee of the Committee on the Judiciary of the United States Senate:

> " Did anyone in the State Department aid you in obtaining employment with the United Nations ? "

At the time the testimony was given the defendant was not an employee of the United Nations, but she had been an employee thereof at an earlier date. She declined to answer the question on the ground that she was forbidden to do so by the " rules and regulations of the United Nations ".

On the defendant's motion for a judgment of acquittal,

Held (by the District Court): that the motion must be denied. Whether the question directed to the defendant was privileged must be determined by the law of the United States. The law of that country recognized no privilege of the nature claimed by the defendant. Regulation 5 and Staff Rule No. 7 of the United Nations, which preclude the disclosure by members of the staff of " any unpublished information known to them by reason of their official position ", had no relevance to this case, inasmuch as the defendant had been asked about events occurring prior to her employment by the United Nations and which would be known to her from sources outside the United Nations. The Headquarters Agreement between the United Nations and the United States could have no application to matters occurring outside that area. The defendant could not avail herself of the immunities provided by Section 7 of the United States International Organizations Immunities Act, 59 Stat. 671, 22 U.S.C. 288d, since the immunity granted by that Act was qualified and applied only to persons notified to and accepted by the Secretary of State. No such action had been taken as regards the defendant. The defendant was convicted. [Report: 111 F. Supp. 223.]

On appeal,

Held (by the Court of Appeals): that the conviction must be reversed, with instructions to grant a new trial. The answer sought by the Sub-committee, in so far as it depended upon data in the files of the United Nations or upon information derived from those files, was privileged by the Charter and the Staff Rules and could not legally be revealed. The Court below also erred in permitting the jury to hear testimony about the appellant's activities which bore only on pertinency and tended strongly to prejudice the jury.

The Court said (*per* Edgerton C.J.): " Appellant was not asked whether anyone in the State Department *told her he would try* to aid her. Perhaps it was a mistake not to ask her that question, but if so, the mistake was not hers. We need not speculate whether she would have answered that question if it had been asked, or whether she would have been punishable if she had not answered it. She was asked whether anyone in the State Department *did* aid her: 'Did anyone in the State Department aid you in obtaining employment with the United Nations ?' Whether she realized it or not, this was equivalent to asking her whether the United Nations officials who decided to appoint her had received and been influenced by communications from anyone in the State Department recommending that she be appointed.

" Staff Rule 7 of the United Nations provides that 'Staff members shall exercise the utmost discretion in regard to all matters of official business. They shall not communicate to any other person any unpublished information known to them by reason of their official position except in the course of their duties or by authorization of the Secretary-General.' In my opinion both the first sentence and the second sentence of this Rule support appellant's failure to answer. (1) Since the appointment of official personnel is official business, appellant could not answer without violating her obligation to 'exercise the utmost discretion in regard to all matters of official business.' She could not, consistently with 'the utmost discretion', even answer that she did not know, for that would have meant that her superiors had not told her. Whether officials do or do not tell an employee who aided her in obtaining employment is a matter of official policy and official business. (2) The question related to 'unpublished information'. The United Nations does not tell the world what recommendations underlie appointments of staff members. The United Nations Administrative Manual even defines 'unpublished information' to include 'the appointment . . . [of] or any other confidential information concerning' a staff member. I think it plain that staff members would not have such unpublished and confidential information unless it had been made 'known to them by reason of their official position.'

" The Charter of the United Nations supports Staff Rule 7. The Charter provides: [The Court here quoted Articles 100 and 105 of the Charter of the United Nations.] Compulsory disclosure of the persons who influence appointments to the staff of the United Nations would not be consistent with the independence of the Organization or 'the exclusively international character of the responsibilities of the Secretary-General and the staff . . .' (Art. 100, Par. 2.) And the prospect of such disclosure might influence staff members, in one degree or another, to regulate their official conduct with a view to avoiding embarrassment of sponsors. The privilege of nondisclosure is therefore ' necessary for the independent exercise of their functions in connection with the Organization.' (Art. 105, Par. 2.)

" Thus the Charter and the Staff Rules of the United Nations establish, in my opinion, the privilege on which appellant relied. And her failure to answer is within the spirit if not the letter of the International Organizations Immunities Act, which provides in § 7 (b), 59 Stat. 672, 22 U.S.C.A. § 288d (b): ' Representatives of foreign governments in or to international organizations and officers and employees of such organizations shall be immune from suit and legal process relating to acts performed by them in their official capacity and falling within their functions as such representatives, officers, or employees except insofar as such immunity may be waived by the foreign government or international organization concerned.'

" So far in this opinion I speak only for myself. But we all agree that appellant's conviction must be reversed because of errors in the admission of evidence. . . ."

Danaher C.J. concurred separately on the ground that the error requiring a new trial lay in the failure to exclude the jury, and stated that " even if we were to reach the question of the claimed privilege, unless she acquired information by virtue of her official position during the period of her employment by the United Nations that someone in the State Department did aid her in obtaining such employment, she was bound to answer according to the fact."

Prettyman C.J. also concurred separately and agreed with his colleagues regarding the reception before the jury of the evidence relating to pertinency. As to the issue of privilege, the learned Judge said:

" On the other point, concerning the accused's privilege not to answer the question put to her, I find myself midway between my two brethren. I think that, in so far as the answer to the question, ' Did anyone in the State Department aid you in obtaining employment with the United Nations ? ', depended upon data in the files of the United Nations or upon information derived from those files, it was privileged by the Charter and the Staff Rules and could not legally be revealed. To that extent the witness could and should have refused to answer. But it is conceivable that wholly apart from any files or information gleaned from them the witness had knowledge that someone at the State Department did aid her in getting employment. Some such matters are frequently known personally and altogether outside official channels. Information thus obtained was not privileged, and if this witness knew of any of that sort in her case she should have said so. If she did not know of any, she should have answered to that effect. As the event turned out, that was the view of the United Nations Secretariat and also the view later adopted by the witness. It seems to me that her initial position in response to the question was not fully protected.

" At the same time it seems to me that this witness's course might not be deemed by a jury to be a *refusal* to answer. She said in reply to the question that she could not answer under the Staff Rules, etc. She applied to the Secretariat for a ruling, and when the ruling was received she answered the Subcommittee as far as it permitted her to do so. Her answer then was, in effect, that she did not know of any aid from State Department personnel, and she explained why. We discussed this question in a different context in *Bart* v. *United States*[1] and there pointed out, citing cases, that the offense of contempt for refusal to answer is a deliberate and intentional refusal. We remarked: ' If a witness interposes an objection or query to the propriety of a question, *e.g.*, its pertinency, he may not be refusing to answer.'[2] And again we remarked: ' Whether a witness means to refuse to answer is a question to be determined from all the circumstances. Like the element of intent in every criminal case it is a question of fact, determinable by the jury, if there be a jury, under appropriate instruction and definition by the court.'[3] It seems to me that the same reasoning applies to the case at bar. The question whether Mrs. Keeney deliberately and intentionally refused to answer, or merely raised a question as to her ability to answer under binding legal compulsions, was a question to be determined by the jury from all the circumstances."

[Report: 218 F.2d 843.]

D—CONSULS

I.—Appointment and Exequatur

Consuls—Appointment and Status of—Consuls Without Exequatur but Serving with Knowledge of Receiving State—Immunity of.

See p. 391 (*Heirs of Shababo* v. *Heilen and Others.*)

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[1] 1952, D.C.Cir., 91 U.S.App.D.C. 370, 203 F.2d 45, certiorari granted, 1954, 347 U.S. 1011, 74 S.Ct. 872.

[2] 91 U.S.App.D.C. at page 373, 203 F.2d at page 48.

[3] *Ibid.*

II. Position and Functions of Consuls

Consuls—Functions of—Right to Receive and Remit Bequest to Alien—Construction of Treaty—Effect of Executive Order Requiring Deposit in Blocked Account.

In re BRAIER'S ESTATE.

United States, Surrogate's Court, New York County, New York. October 29, 1951.

Supreme Court of New York, Appellate Division, First Department. April 29, 1952.

Court of Appeals of New York. March 5, 1953.

THE FACTS.—The decedent, a resident of New York County, died in Czechoslovakia in 1945, bequeathing her entire estate, consisting of a savings account in a bank in New York City, to her sister, a national and resident of Hungary. The Chief of the Consular Section of the Hungarian Legation, appearing as attorney in fact for the legatee, contended that the funds should be placed in a blocked account maintained by the Hungarian Consulate-General in a United States bank.

Held (by the Surrogate's Court): that the bequest should be deposited with the Treasurer of the City of New York for the account of the legatee, and that withdrawals therefrom must be forbidden without a Court order. [Reports: 108 N.Y.S. 2d 417; affirmed, 279 App. Div. 1008, 113 N.Y.S. 2d 246.]

On appeal,

Held (by the Court of Appeals): that the order of the Surrogate must be affirmed. Article XXI of the Treaty of Friendship, Commerce and Consular Rights between the United States and Hungary, signed at Washington, June 24, 1925, providing that a consul could give a receipt for legacies to non-resident countrymen, did not require that the funds in issue be turned over to the Chief of the Consular Section, since they could not be transmitted to the distributee by reason of United States law.

The Court said: "Section 269 of the Surrogate's Court Act, upon which the surrogate relied, provides that, 'Where it shall appear that a legatee . . . would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee'. Contrary to appellant's contentions, that statute is valid; it may not be stricken as unconstitutional, upon the ground (1) that subdivision (b) of section 5 of the federal Trading with the Enemy Act, U.S.C.A., tit. 50, Appendix, § 5 subd. (b), as amended,

§ 616, assertedly pre-empting the field, precludes local legislation such as section 269; (2) that it contravenes the Treaty between the United States and Hungary; or (3) that it encroaches upon federal power over foreign commerce. We consider each of those grounds.

" Section 5, subdivision (b), of the Trading with the Enemy Act grants to the President ' During the time of war or . . . national emergency ' the power to ' regulate . . . or prohibit, any acquisition holding, withholding, use, transfer . . . importation or exportation of . . . any property in which any foreign country or a national thereof has any interest ' except ' upon such terms and conditions as [he] may prescribe '. Exercising this authority, the President, in April of 1940, issued Executive Order No. 8389, tit. 12 United States Code Ann. § 95a note, Code of Fed.Reg.Cum.Supp., tit. 3, p. 645; prohibiting, ' except as specifically authorized ', all transactions involving property ' in which any foreign country designated in this Order, or any national thereof, has at any time on or since the effective date of this Order had any interest '. Section 3 made March 13, 1941 the ' effective date of this order . . . with respect to ' nationals of Hungary.

" This federal regulatory scheme, it is self-evident, serves a purpose entirely unrelated to the goal of the New York provision. The national enactment seeks to ' check . . . trading with the enemy. Its prime purpose is to stop such uses of foreign property rights as might imperil national defense.' *Commission for Polish Relief* v. *Banca Nationala a Rumaniei*, 288 N.Y. 332, 337, 43 N.E.2d 345, 347; see, also, *Alexewicz* v. *General Aniline & Film Corp.*, 181 Misc. 181, 186, 43 N.Y.S.2d 713, 719. Section 269 of the Surrogate's Court Act, in contrast, aims ' to promote the basic object and obligation of Courts of decedent devolution to use their utmost endeavors to effectuate the express or implied wishes of a decedent respecting the dispersal of his assets on death.' *Matter of Weidberg*, 172 Misc. 524, 528, 15 N.Y.S.2d 252, 256. A note appended to section 269, indicative of its design, see *Matter of Pelcyger*, 171 Misc. 1016, 1017, 14 N.Y.S.2d 190, 191, recites that it shall apply ' where transmission or payment to a beneficiary, legatee, or other person resident in a foreign country might be circumvented by confiscation in whole or in part.' L.1939, ch. 343, note; see, also, Note, 17 N.Y.U.L.Q.Rev. pp. 314–316; cf. Opton, Legacies to Foreign Residents and the New Amendment to Section 269, Surrogate's Court Act, N.Y.L.J., Sept. 21, 1939, p. 728, col. 1. Since section 269 treats a matter beyond and outside the scope of the federal law, the area covered by the New York provision could not have been pre-empted by the national enactment. See *Maurer* v. *Hamilton*, 309 U.S. 598, 602, *et seq.*, 60 S.Ct. 726, 84 L.Ed. 969; *Kelly* v. *Washington*, 302 U.S. 1, 4 *et seq.*, 8, 58 S.Ct. 87, 82 L.Ed. 3; *People* v. *County Transp. Co.*, 303 N.Y. 391, 396, 402, 103 N.E.2d 421, 424, 428.

" Not only do the two provisions treat variant problems, but, equally important, their application—as illustrated by the case before us—in no way conflicts. As the Consular Section concedes, Executive Order No. 8389 bars delivery of the bequest to the foreign legatee, requiring, instead, its deposit ' in a blocked account in a domestic bank or with a public officer, agency, or instrumentality designated by a court having jurisdiction of the estate '. Public Circular No. 20, issued Oct. 23, 1942, Code of Fed.Reg., Cum.Supp., Tit. 31, p. 8926, explaining General License 30A, Code of Fed.Reg., Cum.Supp., Tit. 31, § 131.30a, issued under Executive Order No. 8389. Achieving exactly the same result, the surrogate herein relied on section 269 to direct deposit of the bequest with the city treasurer. And this action has been approved by the very official charged with effectuating the goals of the federal statute; he wrote, in response to the executor's request for a license to transfer the bequest to the city treasurer, that ' It would be in accordance with the policy of this Office to issue such a license '. Since a state provision ' will be stricken only if—in terms or in practical administration—it conflicts with the Federal law or infringes on its policy ', it necessarily follows that section 269 may stand along with subdivision (b) of section 5 of the Trading with the Enemy Act. *Quaker Oats Co.* v. *City of New York*, 295 N.Y. 527, 534, 68 N.E.2d 593, 595, affirmed *sub nom. Hill Packing Co.* v. *City of New York*, 331 U.S. 787, 67 S.Ct. 1314, 91 L.Ed. 1817; see, also, *Union Brokerage Co.* v. *Jensen*, 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed. 1227; *Cloverleaf Butter Co.* v. *Patterson*, 315 U.S. 148, 62 S.Ct. 491, 86 L.Ed. 754; *Kelly* v. *Washington*, *supra*, 302 U.S. 1, 58 S.Ct. 87; *Gilbert* v. *State of Minnesota*, 254 U.S. 325, 41 S.Ct. 125, 65 L.Ed. 287.

" Nor does the surrogate's application of section 269 contravene provisions of the Treaty between this government and Hungary.[1] Nothing contained in that Treaty compels, or even sanctions, transfer of the bequest to the Hungarian Consular officer. Article XXI of the Treaty, 44 U.S.Stat. 2459,—the article relied on by appellant—recites: ' A consular officer of either High Contracting Party may in behalf of his non-resident countrymen receipt for their distributive shares derived from estates in process of probate . . . *provided he remit any funds so received through the appropriate agencies of his Government to the proper distributees* '. (Emphasis supplied.) By the proviso just quoted, the consular officer must be in a position to ' remit ' the funds in question ' to the proper distributees '. That cannot, of course, be done in this case. The law of this country, as previously noted, expressly bars export of the funds. Indeed, when, on another occasion, the Hungarian Consul asserted his rights under the Treaty, the court decided against him, saying that, by reason of the freezing order, ' there is an inference that if the share were paid to the Consul it would not reach the distributee himself.' *Matter of Plemich*, 176 Misc. 560, 561, 28 N.Y.S.2d 86, 88; see, also, *Matter of Yee Yoke Ban*, 200 Misc. 499, 500, 107 N.Y.S.2d 221, 222.[1] Since, then, the Consular Section could not ' remit . . . to the proper distributees '—to use the language of the Treaty—article XXI did not require that the funds be deposited in its name. It follows, therefore, that deposit of the bequest with the city treasurer, pursuant to section 269, in no way conflicts with the rights of either Consular Section or legatee under the Treaty. . . ."

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[1] Although the Treaty expired on July 5, 1952, see State Department Bulletin, Vol. XVIII, No. 455, pp. 382–383; Vol. XXV, No. 629, pp. 95–96; Vol. XXV, No. 649, p. 914; Vol. XXVI, No. 667, p. 946, and is no longer in effect, we have assumed that its provisions are here controlling, since it was in force when the case was denied by the surrogate. Cf. *Santovincenzo* v. *Egan*, 284 U.S. 30, 36, 52 S.Ct. 81, 76 L.Ed. 151 [*Annual Digest*, 1931–1932, Case No. 114].

[Reports: 305 N.Y. 148, 111 N.E.2d 424.]

NOTE.—In *Re Siegler's Will*, 284 App. Div. 436, 132 N.Y.S.2d 392 (3rd Dep't 1954), the Hungarian Minister had submitted a certificate that the Hungarian legatees under a will would have the " full benefit, use and control of the moneys " representing their legacies and that the National Bank of Hungary would pay to the legatees an equivalent in Hungarian currency at the official rate of exchange and without deductions or taxes. The Court directed the same disposition of the legacies as in *Re Braier's Estate*, on the ground that " the United States has no policy that would require a local court to give full faith and credit to the certificate of the Hungarian Envoy " and must therefore rely on the regulation of the Treasury Department.

Consuls—Consular Powers—Diplomatic Representative Temporarily Acting as Consul—Power to Accept Affidavit—Presumption of Identity of Law of Sending State and Law of Receiving State.

LANDAU *v.* BORWIN.

Israel, Supreme Court sitting as the Court of Civil Appeals.
January 21, 1953.

THE FACTS.—In an earlier appeal in litigation between the same parties concerning succession to property, the Supreme Court had returned the case to the Court below for further evidence. That evidence was later submitted to the lower Court in the form of an affidavit sworn by the respondent in Johannesburg before Mr. Goitein, who at the time was Minister Plenipotentiary of Israel at Pretoria. Attached to Mr. Goitein's signature was the seal of the Consulate-General of Israel in Johannesburg. Evidence in the form of a ' Foreign Office Certificate ' was before the Supreme Court (at its request) to the effect that, in accordance with standing instructions, the Minister became responsible for consular affairs in the absence of the Consul, who was away from his post on home leave. The admissibility of the affidavit was challenged on the ground, *inter alia*, that the law of Israel did not permit a Minister to take affidavits, and it was not established that the law of South Africa did permit this. This objection was overruled by the Court below.

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[1] See *International Law Reports*, 1952, Case No. 93.]

On appeal,

Held: that the affidavit was properly taken.

The Court said (*per* Agranat J.): " It is true that the Evidence Ordinance . . . contains no provision enabling an Israel diplomatic representative abroad to take affidavits. But by Article 4 (1) of the Personal Status (Consular Powers) Regulations, 1922, (Drayton, *Laws of Palestine*, vol. III, p. 2604) a consul of a foreign State may ' take affidavits . . . in a matter relating to property situated in . . . the territory of the State appointing the consul '. That Article refers to foreign consuls in Israel. In the absence of proof to the contrary, we may assume that the law of South Africa confers similar power upon foreign consuls there.

" Counsel for the respondent argued that a distinction has to be made between the diplomatic and the consular representatives of a State, as had been done by the Israel legislator in an amendment to the Evidence Ordinance, passed in 1950; and that the cited Article 4 (1) only applied to consular representatives, the definition of consul in those Regulations not comprising a Minister. He further contended that Mr. Goitein was not a consular representative when the deponent appeared before him, a fact proved by the words ' Minister of Israel ' appearing under his signature. [The Court here referred to the certificate received from the Israel Foreign Ministry and continued:] This establishes that Mr. Goitein was competent to accept the respondent's affidavit, and this ground of the appeal therefore fails."

[Reports: *Piskei-Din*, vol. 7 (1953), p. 35; *Pesakim Elyonim*, vol. 12 (1953), p. 35.]

NOTE.—The use of the Foreign Ministry Certificate in this case has been criticized by Rosenne in *Hapraklit*, vol. 11 (1955), p. 33, on the ground that the certificate is not an *alternative* method of proving facts for which normal evidence can be adduced. By the Evidence Ordinance (Amendment) Law, 5711–1950 (*Laws of the State of Israel*, authorized translation from the Hebrew, vol. V (1950/1), p. 10), " diplomatic representative " was defined as " an ambassador, minister, chargé d'affaires, plenipotentiary, counsellor of legation or secretary of legation exercising his functions in a foreign State ", and " consular representative " was defined as " a consul-general, consul, vice-consul, acting consul-general, acting consul or consular agent exercising his functions in a foreign place ". Neither the original Evidence Ordinance (Drayton, *Laws of Palestine*, vol. I, p. 670) nor the amendments thereto expressly empowered either a diplomatic representative or a consular representative to take affidavits.

Consuls—Functions of—Consul Acting as Commissioner of Court of Sending State—Adoption Proceedings.

See p. 261 (*Adoption* (*Double Nationality*) *Case*).

III.—Privileges and Immunities of Consuls

Consuls—Privileges and Immunities of—Immunity of Foreign State—Consul Not in Possession of Exequatur but Serving with Knowledge of Receiving State—Necessity for Recognition by Receiving State—Diplomatic List—Foreign Ministry Certificate—Necessity for—Interpretation of Certificate When Equivocal—Consulate—Whether a Judicial Person or a Department of a Foreign State—Immunity of Employee of Consulate—Personal Liability—Relation of International Law and Municipal Law—The Law of Israel.

HEIRS OF SHABABO *v.* (1) HEILEN, (2) THE CONSULATE-GENERAL OF BELGIUM IN JERUSALEM AND (3) THE CONSUL-GENERAL OF BELGIUM IN JERUSALEM.

Israel, District Court of Jerusalem. March 30 and *July* 13, 1953.
(Vitkon J.)

THE FACTS.—This was an action for damages brought by the widow of the late Shababo, who had been run over and killed in the City of Jerusalem by a car driven by Heilen, a soldier in the Belgian Army on duty with the Belgian Consulate-General in Jerusalem. The action was brought against Heilen, the driver, against the Consulate-General and against the Consul-General. The car belonged either to the Consulate-General or to the Consul-General. It was being driven on duty at the time of the accident. A conditional appearance was entered by the three defendants, who pleaded that the Court lacked jurisdiction on three grounds: (a) The defendants enjoyed diplomatic immunity; (b) the defendants did not recognize the jurisdiction of the Court because they did not recognize that Israel could exercise sovereign rights in the City of Jerusalem owing to the United Nations policy for the internationalization of Jerusalem; and (c) while the civil liability of the Belgian Government in principle was recognized, the Court could not exercise jurisdiction because of the rule *par in parem non habet jurisdictionem.*

Prior to the hearing, the Judge applied to the Minister for Foreign Affairs for a certificate regarding the diplomatic status of all or any of the defendants. The Foreign Minister's reply, dated January 8, 1953, was in the following terms:

"Comte Thiery de Lichtervelde, in charge of the Belgian Consulate-General in Jerusalem, was sent to Jerusalem on behalf of the Belgian Government and with the knowledge of the Israel Government as representative of the Belgian Government as well as serving as Consul-General of Belgium in Jerusalem; but the Israel Government had not been asked to issue an exequatur, and no consular exequatur has been issued to him. The name of Roger Heilen appears on the list of official employees of the said representative of the Belgian Government which has been submitted to the Ministry of Foreign Affairs."

Some doubt having arisen concerning the correct interpretation of that certificate, the Court enquired further of the Minister:

"Have the defendants in this case, all or any of them, been recognized by the Israel Government as diplomatic representatives or as belonging to the staff or suite of a recognized diplomatic representative ?"

An oral reply was subsequently delivered to the Court by the representative of the Attorney-General, who had intervened in this case on account of the public interest involved. In that reply it was stated:

"I have been instructed by the Foreign Minister to inform the Court in reply to the question put by the Court during the session of January 23rd, 1953, that the facts regarding the defendants are as has been described in the certificate dated January 8th, 1953, submitted by the Legal Adviser of the Foreign Ministry on instructions from the Foreign Minister, and that the Foreign Minister regrets his inability to furnish the Court with any reply to the specific question asked of him."

The Court decided to hear the question of diplomatic immunity as a preliminary question before proceeding to the hearing on the merits.

Held: I. (at the preliminary hearing) that the plea of diplomatic immunity must be dismissed. Diplomatic immunity could only be pleaded by a physical person, and not by a Consulate. The Foreign Minister was not obliged to reply to questions put to him by the Court. When the circumstances were equivocal, the Court was entitled to make its own deductions. For a plea of diplomatic immunity to be successful, the defendant must not only prove that he was sent with the knowledge of the receiving Government, but that the receiving Government had recognized and accepted him as such.

II. (at the hearing on the merits) that the Consulate-General and the Consul-General were entitled to the benefit of the plea *par in parem non habet jurisdictionem.* Judgment was awarded to the plaintiffs against Heilen only, in the sum of 29,500 Israeli Pounds.

I. The Court said (at the preliminary hearing): "It should be made clear at the outset that only a physical person, and not a legal person, can claim diplomatic immunity so that it cannot be pleaded in respect of the second defendant, the Consulate-General, whatever its legal character. In respect to this defendant this Court will, in due course, have to deal with the argument of *par in parem* and the remaining pleas.

"The plaintiffs' representative argued that the law of Israel does not recognize diplomatic immunity. He referred to Article 38 of the Palestine Order-in-Council which states that the civil courts 'shall exercise jurisdiction in all matters and over all persons' in the country. This, he argued, grants jurisdiction over every person in the country, without exception, and leaves no room for the application, through Article 46 of the Order-in-Council, of the English law regarding the incorporation of international law, including the principle of diplomatic immunity. I unhesitatingly reject this plea. Article 38 serves as a kind of preamble to that part of the Palestine Order-in-Council which deals with the Judiciary and the division of powers between the Courts; it contains no rule of international law. The rules of international law, accepted in all civilized countries, are also applicable in the State of Israel, if not by virtue of international law itself then at least through their being part of the English common law which is valid in this country, failing any other regulation, by virtue of Article 46 of the Palestine Order-in-Council and Section 11 of the Law and Administration Ordinance, 5708–1948. The rule, as already said above, that a diplomatic representative and his retinue are exempt from jurisdiction in the country to which they have been sent and accepted as such, derives from the general principles of international law which are part of the English common law, and the Act passed in England in 1708 (7 Anne, ch. 12) only gives statutory expression to such common law (*Engelke* v. *Mussman;* see *Annual Digest,* 1927–1928, Case No. 245).

[In this way the Court reached the conclusion that the question was whether the first and third defendants, Heilen and the Consul-General, were entitled to diplomatic immunity.] " In this type of question, involving as it does foreign relations, the Court has to be guided by the Foreign Minister. [Judge Vitkon thereupon traced the history of the two enquiries to the Foreign Minister and continued:] The outcome is that all we have before us is the contents of the Foreign Minister's reply of January 8, 1953. I do not draw any conclusion either from the appearance of the representative of the Attorney-General and his argument in support of the defendant's contentions (*Luther* v. *Sagor,* [1921] 1 K.B. 456), or from the fact itself that the Foreign Minister did not see his way to give an additional reply to my specific question of January 23, 1953. The Foreign Minister is under no obligation to reply to the Court, and if his earlier document suffers from a certain lack of clarity, it is well known that ' if the facts are complicated and unprecedented his statement cannot be an example of lucidity ' (so Lauterpacht in *British Year Book of International Law,* vol. 20 (1939), at p. 126; see also *Luther* v. *Sagor, supra,* where the British Foreign Office also declined to give additional information to clarify a previous certificate of an ambiguous character).

" There are some other considerations which I think are not relevant to this case and should therefore be disposed of before we proceed to the interpretation of the Foreign Minister's certificate. The certificate speaks of the mission of the third defendant as being ' Consul-General of Belgium in Jerusalem ', although the Israel Government has not been asked to and never has issued him with an exequatur. Counsel for both parties, each in his own way, have tried hard to find support in these facts, the plaintiffs arguing that the mission of the defendant 'as representative of the Belgian Government' is nothing but a consular mission, and that, as is well known, consuls are not entitled to diplomatic immunity (see Oppenheim's *International Law*, 7th ed. by Lauterpacht (1947), vol. 1, p. 752); while the defendants pleaded that in the absence of an exequatur the third defendant has no consular status so that he is of necessity a diplomatic representative. In my opinion this is a confusion of thought. A man may serve both as diplomatic representative and as consul at one and the same time, and lately we have many instances where both functions have been combined in one person (see Hackworth, *Digest of International Law*, vol. 4, p. 423; *Engelke* v. *Mussman, supra*; *Price* v. *Griffin* cited in *British Year Book of International Law*, vol. 26 (1949), p. 433, and especially at p. 435). Whether or not, therefore, the defendant was a consul, there is nothing in this which is material to the question whether or not he is entitled to immunity as a diplomatic representative.

" It is also irrelevant that the Belgian Government is represented in Israel by a Minister residing in Tel-Aviv, because a foreign country may be represented in another country by more than one diplomatic representative (Oppenheim, *op. cit.*, p. 699). On the other hand, there are instances where a person is sent to another country as a representative of his Government and country without having been furnished with diplomatic privileges, in whole or in part (see Hackworth, *op. cit.*, pp. 405 and 542; *Fenton Textile Association Ltd.* v. *Krassin* [*Annual Digest*, 1919–1922, Case No. 212] *per* Scrutton L.J., and *Luther* v. *Sagor, supra*).

" Let us return to the Foreign Minister's certificate and see what is the interpretation of the other facts described therein, *i.e.*, that the third defendant was sent to Jerusalem on behalf of the Belgian Government with the knowledge of the Israel Government as representative of the Belgian Government, and that the name of the first defendant appears on the list of official employees of the third defendant which was submitted to the Foreign Ministry. These facts clearly testify that the Belgian Government did everything to assure the third defendant the status of a diplomatic representative and the first defendant the status of a person belonging to the retinue of a diplomatic representative. But there is nothing in the certificate of the Foreign Minister to say that the Israel Government has for its part taken any practical and positive step to accept the third defendant as such diplomatic representative and the first defendant as a member of his suite, and to recognize them as such. The question is whether such an acceptance and recognition is required to grant the defendants diplomatic status, and if so, whether it is possible to deduce such acceptance and recognition from the text of the certificate.

" The whole question of diplomatic immunity in its historical development was dealt with in England in two important decisions of the House of Lords: *Duff Development Co.* v. *Government of Kelantan* (see *Annual Digest*, 1923–1924, Case No. 65) with regard to the law and practice in England, and *Engelke* v. *Mussman*, cited above; and much instructive material is also to be found in the articles of Mr. A. B. Lyons in *The British Year Book of International Law*, vol. 23 (1946), p. 241, and vol. 26 (1949), p. 433. For the purpose of this case I recall some basic rules arising out of these authorities. First, the status of diplomatic representative depends on recognition by the sovereign of the country to which he is sent. The Court is not free to recognize or refuse recognition of such status as it sees fit, but this recognition is one of the prerogatives of the sovereign, and the Court has only to state, on the strength of the material submitted to it, whether the sovereign has recognized such person as a diplomatic representative or not. The question before the Court, therefore, is not whether a defendant is a diplomatic representative, but whether he has been recognized as such by the sovereign or Government. All sources and authorities speak of an ' accredited ', ' recognized ', ' accepted ' or ' received ' diplomatic representative and not simply of a diplomatic representative. This is especially emphasized by Lord Phillimore in *Engelke* v. *Mussman*, as follows:

" ' When a question arises in the Law Courts whether a ruler is a Sovereign and a proper Secretary of State is consulted, the right answer is not " A.B. is a Sovereign " but " A.B. is recognized by His Majesty as a Sovereign "; so I think the exact enquiry in this case is not whether the defendant is a member of the ambassadorial staff but whether he has been accepted and recognized by the Crown as such a member . . . '

" Secondly, no importance is attached to the formal manner by which the representative was accepted or recognized. The form differs according to the rank of the representative and the terms of his mission (see Hackworth, *op. cit.*, p. 412). Mr. Lyons in *British Year Book of International Law*, vol. 23 (1946), says (at pp. 253–254):

' The . . . ambassador . . . is accepted and received by the King, and his personal immunity has effect from that moment. Subordinate members of the mission are not today received in person by the King, but the names of those for whom immunity is claimed are submitted to the Foreign Office by the minister to whose staff they belong, and if no objection is raised by the Foreign Secretary they become entitled to diplomatic immunity.'

Later (at p. 256) the author enlarges upon the value of the list of legation employees (and here our case is not affected by the fact that in England the question of the list is governed by the Act of 1708):

" ' The King cannot be expected to receive and know every minor official of every diplomatic staff; and the practice appears to be for the list submitted by each head of legation to the Foreign Office to be scrutinized there: those names which are not rejected are incorporated in the next issue of the Foreign Office List. Publication constitutes acceptance and may be said to some extent to vest with diplomatic immunity persons whose names are newly added. Probably, this vesting dates back to the commencement of their employment on the diplomatic staff, but it is certain that employment alone, even with entry on the list submitted *to* the Foreign Office, is not sufficient. This was decided in the early cases of *Wigmore* v. *Alvarez*, (1731) 94 E.R. 719, 2 Sharpe 797, and *Fisher* v. *Begrez*, (1832) 1 G. & M. 117, at p. 117, and in 1891 by *In re Cloete* [1891] 65 T.L.R. 102.'

" It appears, therefore, that in England there are two lists, one submitted by the head of the diplomatic mission to the Foreign Office, and one published by the Foreign Office after examination of the first list and after the names of those not accepted have been deleted. Only publication in the second list constitutes acceptance and recognition of a person entitled to diplomatic immunity. The inclusion of the employee's name in the list submitted to the Foreign Ministry is not enough. An act is still required whereby the Foreign Ministry accepts the proposed candidate for immunity and approves him. This version by the author of the article, based as already said on authorities and practice, removes any doubt which had been raised in my mind by a statement in Oppenheim on p. 702, where it is said:

" ' It is a customary rule of International Law that a State which does not object to the appointment of a certain individual when its opinion has been asked beforehand is bound to receive such individual.'

In a footnote Oppenheim raised this problem:—

" ' The question is of interest whether the privileges due to envoys must be granted on his journey home to an individual to whom reception as an envoy is refused. The question, it is believed, ought to be answered in the affirmative; see, however, Moore, *Digest of International Law*, iv, § 666, p. 668.'

Oppenheim apparently had in mind, in that footnote, the case of an envoy whom the receiving country had already notified its willingness to accept. Anyhow, I understand from the article of Mr. Lyons, and am inclined to accept, that a passive attitude on the part of the receiving country will never grant an envoy diplomatic status, whatever the attitude of the sending country. It should be noted, incidentally, that the act of recognition need not take the form of publication of the name in the List (*vide* the practice in the United States, as appears from Hackworth, *op. cit.*, p. 430). Again, it appears that in *Price* v. *Griffin* the British Foreign Office did not depend on the List (*vide* Mr. Lyons, *loc. cit.*, vol. 26 (1949), p. 436). But *Engelke* v. *Mussman* does not leave any room for doubt that the essence of the whole matter of immunity is that the defendant is recognized as diplomatic representative, and that in respect of members of the diplomatic staff their recognition is not self-evident from the fact of submitting the list containing their names, without an additional step on the part of the Foreign Ministry of the receiving State.

'The receipt of the list is not a matter of routine but requires examination', says Lord Dunedin at p. 448. Furthermore, *Duff* v. *Kelantan* and *Engelke* v. *Mussman* lay down the law as to the legal value of the Foreign Minister's certificate. It is not a piece of evidence, but a notification by the sovereign through one of his Ministers of a matter peculiarly within his cognizance. Also this rule, which in comparison with earlier opinion represents a new development, strengthens the view that the acceptance of an envoy and his recognition by the Foreign Ministry are the very acts which create his status, and that such recognition has constitutive, and not merely declaratory or evidential, force.

"To return to the case before us, let us examine the certificate of the Foreign Minister in the light of these rules. It says that the third defendant was sent by the Belgian Government as its representative. To my mind, it is clear from all that was said above that this fact alone is not sufficient to grant the third defendant diplomatic status. The certificate goes on to say that he was sent 'with the knowledge of the Israel Government'. In my opinion, this fact, again, does not change the position. 'Knowledge' is not tantamount to 'recognition', and here we cannot say that 'silence is consent'. This applies also to the third fact contained in the Foreign Minister's reply, namely, that the name of the first defendant appears in the list of employees of the third defendant which was submitted to the Foreign Ministry. The certificate does not say a word about the reaction of the Foreign Minister to the list submitted, and the Court must not make any assumptions or attribute to the Minister any decision which he might or might not have made. Moreover, I cannot see how diplomatic immunity could be granted to the first defendant on the strength of the inclusion of his name in the list of employees submitted to the Foreign Ministry so long as we do not find that the third defendant, in whose retinue he is included, is entitled to such immunity. To sum up, a defendant who claims diplomatic immunity must prove his title to it, and in this case the defendants did not prove their claim, which must therefore be rejected.

"Counsel for the defendants notified his intention to bring an appeal against this decision to the Supreme Court, and I hereby grant leave to appeal. To avoid any doubt, however, such leave does not entail by itself any postponement of the hearing of the case itself, which in my opinion is urgent, until after the completion of the appeal." [Report: *Pesakim Mehoziim*, vol. 8 (1953), p. 455.]

II. At the hearing on the merits, the Judge first dealt with the remaining pleas as to jurisdiction. He said:

"After my decision of March 30, 1953, the defendants by motion put forward their case regarding the principle *par in parem* and also regarding the jurisdiction of the Court in the area of Jerusalem. I rejected this latter plea because it clearly has no basis, *inter alia*, for the reasons stated by the Supreme Court in *Steinberg* v. *Attorney-General* [see *International Law Reports*, 1951, p. 10]. I see no difference between criminal jurisdiction and civil jurisdiction on this point. As to the first argument, I decided not to accept it forthwith so as to dismiss the claim *in limine*, but to deal with it in my principal judgment. After that decision was given, counsel for the defendants announced that his client did not intend to continue taking part in the action before this Court, but I explained that I could not discharge him from his duty as representative of the defendants. If, however, he should absent himself from the courtroom I would not regard that, in the particular circumstances of this case, as a breach of professional courtesy but the case would continue in accordance with the provisions of Rule 187 (b) of the Civil Procedure Rules, 1938, without there being any necessity to give further notice to the defendants themselves. At the hearing which took place immediately after that, counsel for the plaintiffs produced his evidence and completed his argument, and now I have to deal with all the questions, including the question of jurisdiction concerning which I heard the arguments of the defence in the earlier motion.

" In so far as concerns the argument *par in parem*, a distinction has to be made between the three defendants. No authority has been brought to my attention to establish that the first defendant enjoys this immunity. He is sued as a private person, and the suit against him is one *in personam*. He is not a foreign sovereign, nor is he a department of a foreign State, nor is a foreign sovereign Government represented by him. If judgment should be awarded against him it will not operate against the property of a foreign sovereign State. Therefore I dismiss this plea in so far as it relates to the first defendant.

" As to the other defendants, counsel for the plaintiffs argued that they too are not included among the persons or bodies entitled to this immunity. According to him, one has to distinguish between two sets of circumstances. When the action is brought directly against a foreign sovereign the suit has to be dismissed, whether it is an action *in personam* or whether it is an action *in rem*. The foreign sovereign is immune from the jurisdiction regardless of the nature of the suit. But when the action is brought against a person or some other corporate body and only indirectly relates to the foreign sovereign or the foreign sovereign State, this immunity can be claimed only when the object of the action is a thing or other property belonging to the foreign sovereign, and, as a result of the action, that thing or property would be removed out of his possession or control. Counsel for the plaintiffs based himself principally on the decision of the English House of Lords in the case of [*United States of America and Republic of France* v. *Dollfus Mieg et Cie S.A. and Bank of England:* see *Annual Digest*, 1949, Case No. 36; *International Law Reports*, 1952, Case No. 37]. I have examined the literature on the subject and from that it appears that the distinction is not always made between actions brought against a foreign sovereign and actions brought against foreign sovereign States or foreign sovereign Governments or one of their departments. So, for example, Dicey, *Conflict of Laws*, 6th ed. (1949), pp. 131 ff; Cheshire, *Private International Law*, 3rd ed., p. 132. On the other hand, this distinction is clearly brought out in Wolff, *Private International Law*, 2nd ed., pp. 56–58. At all events the English precedents, and particularly the judgment in *Krajina* v. *Tass Agency* (see *Annual Digest*, 1949, Case No. 37), leave no room for doubt that immunity attaches both to a foreign State and to a claim against a department of a foreign State not only when the claim is one *in rem* but also when it is a claim *in personam*, asking the department to pay a sum of damages for a civil wrong, for example for libel, as in the *Tass* case. This is clearly the law, and this conclusion is logical. For this reason it is necessary to examine the characteristics of the second and third defendants.

" Counsel for the plaintiffs argued that in the absence of any evidence adduced by these defendants it is not possible to regard them as ' departments of a foreign State '. We do not know, so runs the argument, what exactly is ' The Consulate-General of Belgium ' in Jerusalem, whether it is part of the foreign service in accordance with the organizational pattern of the Belgian Civil Service, or not; and he went on that this is not a matter of judicial notice which requires no proof. In my opinion this argument must be rejected. The plaintiffs did not specify in their claim what are the characteristics of the body entitled ' The Consulate-General of Belgium '. Obviously this is not a physical person, nor is it a juridical person incorporated or registered in Israel in accordance with the law of Israel. Therefore we must assume that what was intended was that type of institution commonly known as a Consulate, that is to say, a representation of a foreign State for certain purposes, which are not diplomatic purposes, as is described, for example, in Oppenheim's *International Law*, 6th ed. vol. 1, pp. 743 ff. Furthermore, even assuming that this is not a matter of common notoriety, there is before me some evidence as to the nature of this Consulate in the communication which was made to the Court on the instructions of the Minister for Foreign Affairs. On this basis I have reached the conclusion that the Consulate-General of Belgium in Jerusalem is part of the foreign service of that country, that is to say, is a department of a foreign sovereign State, in consequence of which it is immune from territorial jurisdiction here. I add, in order to remove all doubt, that in so far as concerns *this* immunity we are not faced with the same problem as arose when the diplomatic immunity of the defendants was alleged, that is, the problem whether they have been recognized as diplomatic representatives by the Government of Israel. Here the immunity is granted to a foreign State itself and naturally there is not the slightest doubt that the State of Israel has recognized that foreign State as a foreign sovereign State.

"The same is true as regards the third defendant, the Consul-General of Belgium. From the fact that the action has not been brought against him in his personal capacity and in his personal name, with or without some indication of his official duty, but only against the holder of a certain office, I am drawn to the conclusion that what is intended is not a physical private person who was described in the way he was described in the Statement of Claim merely for the purpose of identification. I refrain from going into the problem if it is possible at all to bring an action in this manner, since the defendants themselves did not raise this question. It is sufficient for me to state that, also in so far as concerns the third defendant, the claim is really brought against a body which is part of the civil service of a foreign sovereign State. It results that the claim against the second and third defendants is misconceived and it has to be dismissed for want of jurisdiction."

The remainder of the judgment dealt with the merits of the claim against Heilen, the first defendant, and awarded the plaintiffs damages and costs in the sum of 29,500 Israeli Pounds.

[Report: Unpublished.]

Consuls—Immunity of—*Franchise de l'hôtel*—Execution—Distinction between Execution against Foreign State and Execution on Premises Belonging to Foreign State—Right of Asylum—Judgment Debtor Seeking Asylum in Consulate-General—Power of Police to Force Entry Against Will of Consul-General for Purpose of Arresting Judgment Debtor.

HEIRS OF SHABABO *v.* HEILEN (No. 2).

Israel, Jerusalem District Court Execution Office. October 15, 1953.

(Vitkon J. sitting as Chief Execution Officer.)

THE FACTS.—After judgment had been given against Heilen in the sum of I£. 29,500 in the case of *Heirs of Shababo* v. *Heilen and Others* (see *supra*, p. 391), the judgment creditors sought to enforce the judgment. As the judgment debt was not paid, application was made to the Chief Execution Officer under s. 10 of the Debt (Imprisonment) Ordinance (*Laws of Palestine*, Chapter 48) for examination of the judgment debtor as to means. The judgment debtor having failed to appear in court in response to a duly issued summons, a warrant for his arrest was issued. It then appeared that Heilen was remaining within the precincts of the Belgian Consulate-General in Jerusalem, and although the police were normally bound to arrest a judgment debtor wherever he might be and bring him before the Execution Office, they felt in this case, in accordance with instructions received, that they were not entitled to enter the precincts of the Consulate-General and effect therein an arrest contrary to the wish of the Consul-General. Application was thereupon made by the judgment creditor to the Chief Execution Office for an order to the police to enter the Consulate-General for the purpose of making the arrest. The judgment debtor was not represented at the hearing, but the representative of the Attorney-General opposed the application, arguing that the warrant could only be executed outside the area of the Consulate-General.

Held: that there was no principle of international law which permitted the premises of a Consulate-General to be used as a place of refuge so as to frustrate the normal course of justice. The police were, therefore, specifically directed to enter the premises of the Consulate-General and effect the arrest therein.

The Court said: " At first sight this would seem to be a theoretical question. The Consul-General has informed the Execution Office through his counsel that the judgment debtor has no assets either here or abroad, and I have not heard from counsel for the plaintiffs that he has any reason to doubt the accuracy of that statement. But the judgment creditor has the right to examine the debtor, and he is entitled to insist upon that right. Furthermore, every creditor whose debt has not been settled is entitled, subject to the conditions laid down in the Ordinance, to demand the imprisonment of the judgment debtor for a period of 21 days, and counsel for the plaintiffs has already intimated his intention of exercising this right after I ordered the judgment debtor to pay to the plaintiffs I£. 42.– per month (approximately one-third of his salary) and he has failed to comply with that order.

" The action instituted by the plaintiffs was not brought only against the judgment debtor. The Belgian Consul-General and the Consulate-General were also cited as defendants, but the action against them was dismissed, on the ground, amongst others, that they constitute a department of a foreign State entitled to exemption from local jurisdiction. As far as they are concerned the Court applied the rule *par in parem non habet imperium* as it applies in England, even though it would not be superfluous to mention here, in parenthesis, that increasing numbers of jurists are doubtful as to the applicability of this rule at least in so far as concerns State activities *jure gestionis*, although not as regards State activities *jure imperii*. This tendency to restrict the immunity of foreign sovereigns found striking expression in Belgium, as was pointed out by counsel for the plaintiffs when he relied upon the remarkable judgment of the 5th Chamber of the Civil Tribunal of Brussels in the case of *Socobelge et État belge* c. *État hellénique, Banque de Grèce et Banque de Bruxelles* (see *International Law Reports*, 1951, Case No. 2 [*sub nom. Socobel* v. *Greek State*]). See also Lauterpacht, ' The Problem of Jurisdictional Immunities of Foreign States ', in *British Year Book of International Law*, vol. 28 (1951), p. 220.

" For the purpose of this case, however, it has already been decided that the Consulate-General of Belgium in Jerusalem is a department of a foreign sovereign State. The representative of the Attorney-General based his case on the judgment which so found, and from that drew the conclusion that not only is the Consulate-General immune from local jurisdiction but also from any step by way of execution which might affect its property: *Dexter and Carpenter* v. *Kunglig Jarnvagsstyrelsen* (see *Annual Digest*, 1929–1930, Case No. 70). I am ready to assume that the property of the Consulate cannot be attached or subjected to any other step by way of execution, but that does not solve the problem before us. I have not been asked to attach property of the Consulate-General nor to execute any judgment against it. The representative of the Attorney-General argued that the entry of the police into the building of the Consulate-General using force if need be, breaking down doors, etc., is tantamount to an act of execution against it, that is to say, any step such as this is to be regarded as an act *in rem* for executing the judgment, which is forbidden, according to the argument of the representative of the Attorney-General. He added that even if the Consul-General is not entitled, according to the rules of public international law, to refuse entry to the police, as agents of the Execution Office, or to prevent them from arresting the judgment debtor who is inside the building seeking asylum, then this would still not entitle the police to break into the premises and meet one wrong by another. The correct procedure, so he argued, would be for them to act through the diplomatic channels. It appears, therefore, that there are two questions involved: First, is the Consul-General entitled to oppose the entry of the police into the Consulate-General for the purpose of arresting a judgment debtor inside its premises; and secondly, if the answer is in the negative, are the police entitled, nonetheless, in the face of unjustified opposition, to break into the premises for the purpose of effecting the arrest ?

" I consider that the refusal of the Consul-General to allow the police to enter the Consulate-General's premises and to arrest the judgment debtor is completely unfounded in international law. A considerable number of authorities were cited to me by counsel for the plaintiffs, and these make it clear that no such immunity is granted to the premises of consulates. Furthermore and foremost, I must point out that all the authorities regarding the attachment of property of a foreign State and regarding other acts of execution against such property are not relevant at all to the matter which we are discussing. There is a wide difference between attachment of property belonging to or in the possession of a foreign State and entry, even forcible, upon such property. It is, of course, true that such entry constitutes interference with that property, but such interference does not have as its object to remove that property from the control of the foreign State. Were entry against the will of the Consul tantamount to attachment or other forms of execution, there would be no need for the law to treat these two aspects separately and to determine the rules applicable to each of them independently of the other.

" Here we are concerned with execution against a Consulate-General. It follows that the question of immunity of a department of a foreign sovereign State does not arise at all. What we are concerned with is the right of entry into the Consulate-General and the right of arrest there. These rights can only be challenged if it can be established that the Consulate-General is immune from them by virtue of diplomatic immunity. This is not the case. All the authorities of international law show that a consulate does not enjoy this immunity. Oppenheim, *International Law*, 6th edition, vol. 1, p. 752, dealing with this subject, stresses on p. 754 that the inviolability of consular premises is one of the matters frequently stipulated for in treaties between States. Hackworth, *Digest of International Law*, vol. 2, paragraph 191, p. 621, contains the following statement of the law:

'Foreign ambassadors, ministers, and other accredited diplomatic officers are entitled under international law to certain well-recognized immunities from the local jurisdiction, including, among others, immunity of their official residences and offices from invasion by local authorities. Such authorities may not enter an embassy or a legation for the purpose of serving legal process or of making an arrest. While foreign consular officers do not under international law share this diplomatic immunity, they are nevertheless, as representatives of their governments bearing commissions from their own government and recognized as such officials by the government of the state in which they serve, entitled to special respect and consideration by the local authorities. They may usually display on the buildings or offices used by them for official purposes the coat of arms and the national flag of their country. The consular archives and other official property of the consulate are exempt from search or other interference by the local authorities, and not infrequently the consular buildings or offices themselves are declared by treaty provisions to be inviolable. Such treaty provisions, however, are usually coupled with prohibition against the use of the consular premises for purposes of asylum.'

" The fact that in the present case the Consul-General did not request, and was not granted by the Government of Israel, an exequatur (see the earlier judgment in this case: *supra*, p. 391) need not detain us. It is sufficient for me to recall the distinction existing between diplomatic representatives and consular representatives with regard to inviolability. A consulate does not enjoy such immunity. This is the rule, and any derogation from it has to be provided for by treaty. See also Morgenstern in *British Year Book of International Law*, vol. 25 (1948), p. 236, at pp. 250 and 251.

" Furthermore, even if the Consulate is granted immunity of this character by virtue of some agreement or treaty, the common practice is, as Hackworth points out in the passage already cited, to interpret such immunity as being subject to a general reservation prohibiting the Consul from allowing the Consulate premises to be used for purposes of asylum (compare also the various agreements regarding the immunities of the United Nations buildings, as expounded by Brandon in *British Year Book of International Law*, vol. 28 (1951), p. 101). In so far as concerns premises of a diplomatic mission entitled to this immunity by international law, the question arises in what circumstances is it permissible to grant asylum to refugees (see Miss Morgenstern's article already cited). The representative of the Attorney-General argued that the whole problem of asylum relates only to ' political offenders ', and as the judgment debtor in this case does not belong to that category, it is impossible to treat his case by way of analogy. I am fully aware that the Consul has not sought to base his refusal on the ground of asylum, but it is obvious, in my view, that his refusal to permit the entry of the police into the consular premises in order therein to carry out the arrest is tantamount to granting asylum to the judgment debtor, who is sheltering, so to speak, in the shadow of the Consul's immunity. It is true that the judgment debtor is not a man fleeing from a criminal trial, but his case would seem to be *a fortiori*, that is to say, if it is forbidden to grant asylum to an offender (except a political offender on humanitarian grounds if he is a fugitive from a miscarriage of justice or from mob violence), there is even less justification for extending asylum to a man who is avoiding the duly-constituted civil authority which is in the process of executing a civil judgment against him. The common feature in both these cases is the negative factor, namely, that the diplomatic representatives, let alone the consular representatives, are not entitled to close their doors in the face of the proper civil authority seeking entry in order to effect a lawful arrest. This is not the purpose for which the *franchise de l'hôtel* exists.

" I now turn to the last question, namely, are the police entitled forcibly to enter the Consulate-General against the will of the Consul-General having regard to his unjustified refusal to permit such entry, or is the redress to be sought only through the diplomatic channel ? Here, too, there is a large number of clear authorities supporting the argument of counsel for the plaintiffs. Again I wish to stress that these authorities refer to diplomatic immunity, and their application to a case of alleged consular immunity is, therefore, all the stronger. Oppenheim at p. 713 states:

> ' . . . The immunity of domicile granted to diplomatic envoys comprises the inaccessibility of these residences to officers of justice, police, or revenue, and the like, of the receiving States without the special consent of the respective envoys. Therefore, no act of jurisdiction or administration of the receiving Government can take place within these residences,

except by special permission of the envoys. . . . But such immunity of domicile is granted only in so far as it is necessary for the independence and inviolability of envoys, and the inviolability of their official documents and archives. If an envoy abuses this immunity, the receiving Government need not bear it passively. There is, therefore, no obligation on the part of the receiving State to grant an envoy the right of affording asylum to criminals, *or to other individuals not belonging to his suite*. Of course, an envoy need not deny entrance to criminals who want to take refuge in the embassy. But he must surrender them to the prosecuting Government at its request; and if he refuses, *any measures may be taken to induce him to do so*, apart from such as would involve an attack on his person. Thus, the embassy may be surrounded by soldiers, and *eventually the criminal may even forcibly be taken out of the embassy*.' (My emphasis.)

Similarly, Miss Morgenstern in the 1948 volume of the *British Year Book* cites, at p. 251, footnote 1, the following instruction from the Law Officers of the Crown:

" 'If [the consul] refuses to give entry [for the purpose of arrest of any person charged with crime, whether of a political nature or not] arrest might be made without his concurrence.'

" To conclude, the refusal of the Consul-General to permit the police to enter the Consulate-General and arrest a man who has by the process of law been found liable to indemnify the widow and children of a man killed by him, is a serious act derogating from the sovereignty of the State and one which constitutes interference in a matter within its exclusive jurisdiction. This is what the International Court of Justice at The Hague has had to say regarding such an act:

" 'Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.' (*I.C.J. Reports*, 1950, p. 275.)

No such legal basis has been established in the case before me.

" For these reasons I am of the opinion that my previous order of arrest is not to be limited. My opinion is that the police, who are under the obligation to execute the warrant of arrest issued by the Execution Office, are entitled, and in case of need even bound, to execute the warrant inside consular premises, regardless of whether or not their entry upon such premises should be opposed."

[Report: *Pesakim Mehoziim*, vol. 9 (1954), p. 502.]

NOTE.—Before this warrant could be executed, Heilen's period of compulsory military service in the Belgian Army came to an end and he succeeded in leaving Israel. The issue was then taken up through the diplomatic channels, and in the course of conversations the Belgian Government maintained its point of view according to which the Jerusalem District Court had no jurisdiction in this case at all. A compromise solution was eventually reached, whereby the Belgian Government agreed to make a payment of thirty thousand Israel Pounds, a sum in fact slightly greater than that awarded by the Court.

PART VIII

TREATIES

A—IN GENERAL

I.—Conception and Function of Treaties

Treaties—Meaning of—Multilateral Declarations—Whether Declaration of London of January 5, 1943, a Treaty—Relation of Declaration to Municipal Law.

WERNER *v.* WIDOW ROTSCHILD.

France, Court of Appeal of Paris. July 18, 1953.

THE FACTS.—A French Law of May 7, 1946, provides that a court order for the benefit of a plaintiff of foreign nationality in an action for the eviction of a French tenant cannot be executed unless other accommodation is made available for the tenant. The respondent, a Yugoslav national by origin, was naturalized in France on December 21, 1951. Prior to her naturalization, *viz.* on May 10, 1951, an order was made for her reinstatement in a flat occupied by the appellant, a French national. The respondent had been a tenant of the flat until her eviction during the Second World War in pursuance of a Law enacted during the German occupation. The appellant contended that the order of the lower Court for the execution of the previous order for the respondent's reinstatement should be reversed, on the ground that when the order for reinstatement was made the appellant was not yet a French national. On behalf of the respondent it was contended (i) that the relevant date in determining her nationality was not the date of the order for reinstatement, but the date on which proceedings for the execution of that order were instituted, and that as that date was subsequent to her naturalization, the lower Court had rightly ordered the execution of the order for reinstatement, and (ii) that the Declaration of London of January 5, 1943, which was made by the Allied Powers with the object of invalidating all acts of dispossession of Allied nationals (including Yugoslav citizens) carried out under German occupation, had the legal force of a treaty and precluded the appellant from setting up against it the French Law of May 7, 1946.

Held: (i) that on a true interpretation of the relevant French legislation governing the relationship of landlord and tenant in these matters the relevant date for the determination of the respondent's nationality was the date on which proceedings for the execution of the order for reinstatement were instituted; (ii) that the Declaration of London had the force of a treaty and that the appellant was not entitled to rely on a French municipal Law inconsistent with its terms; and (iii) that the appeal must accordingly be dismissed.

The Court said, with regard to the application of the Declaration of London: " Yugoslavia is one of the 17 Signatory States of the Declaration of London of January 5, 1943, the text of which was published in the *Journal Officiel* of August 10, 1944, together with the ordinance of November 12, 1943, concerning the invalidity of acts of dispossession carried out by the enemy or under his control. This legislation on acts of dispossession, which forms the basis of the ordinance of November 14, 1944, constitutes to some extent the sequel to and execution of the obligations undertaken on behalf of France in this solemn Declaration, which provides for the invalidation of ' transfers and transactions of all kinds effected during the period when French territory was under the direct or indirect control of the enemy '. This Declaration has the force of a treaty, and it may be inferred from it that the Law of May 7, 1946, which suspends, in the case of dispossessed tenants of foreign nationality (unless they satisfy certain requirements) the execution of eviction orders made in pursuance of the ordinance of November 14, 1944, necessarily excludes from its application the case of foreign nationals entitled to rely on a treaty exempting them from these requirements. This is the meaning of the Declaration of London which guarantees, without distinction, the return of their property to all dispossessed persons who are nationals of Signatory Powers. It follows that the Law of May 7, 1946, cannot be relied upon as against the widow Rotschild, irrespective of the date on which the status of the parties has to be determined."

[Report: *Clunet*, 80 (1953), p. 875.]

Treaties—Definition of—Whether an Agreement with a Foreign Port Authority a Treaty in Legal Sense—Requirement of Parliamentary Approval—The Constitutional Law of Germany.

PORT OF KEHL CASE.

German Federal Republic, Federal Constitutional Court. June 30, 1953.

THE FACTS.—The " Land " of Baden concluded an agreement with the " Autonomous Port of Strasbourg " (Port Autonome de Strasbourg) which provided for the joint administration, by the parties to the Agreement, of the port of Kehl (in Germany) as a public corporation under the law of Baden. The Government of the Federal Republic of Germany took the view that this Agreement fell within Article 32 (3) of the Constitution, which provides that

" The ' Länder ' are entitled, within their legislative competence, to conclude treaties with foreign States, with the consent of the Federal Government. "

The Federal Government accordingly gave its consent to the Agreement. The parliamentary section of the Social-Democratic Party, on the other hand, took the view that the Agreement was a treaty within the meaning of Article 59 (2) of the Constitution, which provides as follows:

> " Treaties regulating the political relations of the Federal Republic or relating to matters within the legislative competence of the latter require the consent . . . of the organs competent to enact federal legislation in the form of federal laws."

The Social-Democratic Party accordingly instituted proceedings before the Constitutional Court and contended that in the absence of parliamentary approval the Agreement was invalid.

Held: that only agreements with foreign States and international or supra-national organizations were treaties within the meaning of Article 59 (2) of the Constitution, and that the Agreement between the " Land " of Baden and the Port of Strasbourg (the latter being a corporation subject to the municipal law of France) was not a treaty which required parliamentary approval. For the same reason, and contrary to the view taken by the Federal Government, the Agreement did not require the consent of the Federal Government.

The Court said: " The provisions of the Constitution concerning international treaties apply only to treaties with foreign States and subjects of international law which are to be assimilated to foreign States. So far as concerns the Contracting Parties on the German side, these are the Federal Republic and the ' Länder '. The foreign Contracting Parties must also satisfy these requirements. The term ' treaties with foreign States ' in the sense of Articles 32 and 59 of the Constitution must, however, be interpreted extensively. The foreign Contracting Parties may also be such subjects of international law as are akin to States. Thus, treaties with Unions of States and with international and supra-national organs of Communities of States, in so far as their legal personality is recognized by international law (as, *e.g.*, the European Coal and Steel Community, the International Labour Office, and the Security Council of the United Nations) may be regarded as treaties within the meaning of Articles 32 and 59 of the Constitution, in analagous application of the principles of that Basic Law. The qualifications here postulated, however, are lacking in the case of legal entities which in all matters are subject to the law of a superior State community. Among the latter may be included public corporations which are entirely subject to municipal law. The Port Autonome de Strasbourg is such a corporation. It is neither a State nor a legal entity which in international relations is recognized as an international organization. The Constitution does not contain any provision applicable to agreements with foreign public corporations which are neither States nor assimilable to States. Neither the provisions concerning the international representation of the Federal Republic of Germany nor those concerning the procedural requirements governing the conclusion of treaties (Article 59) are applicable to such agreements; nor is Article 32 (3) of the Constitution applicable to them, *i.e.*, the provision which makes the conclusion of treaties by the ' Länder ' subject to the control of the Federal Government."

[Report: JZ, 8 (1953), p. 569.]

Treaties—Character of—Declaration of London, 1943.

See p. 655 (*De Rothschild* v. *Teuscher and Société d'Encouragement pour l'Amélioration des Races de Chevaux en France*).

II.—Forms of International Agreements:

Treaties—Conventions—Governmental Agreements—Exchanges of Notes—Other Forms of Treaties.

Treaties—Governmental Agreements—Exchanges of Notes—Absence of Ratification and Publication—Applicability in Municipal Courts—The Law of France.

See p. 369 (*Re Spiessens*).

B—CONCLUSION AND OPERATION OF TREATIES

II.—Conditions of Validity of Treaties. Registration of Treaties

Treaties—Operation and Enforcement of—Binding Force in Relation to Individuals—Absence of Publication.

BOILEAU *v.* MÉLARD.

Belgium, Court of Cassation. December 11, 1953.

THE FACTS.—This was an action arising out of an accident of navigation on the Rhine in Netherlands territory. The Commercial Court of Liége, with the agreement of all the parties concerned, ordered an expert inquiry into the accident. Subsequently, however, the present appellant entered a plea to the jurisdiction of the Belgian courts. He invoked Article 34 of the Convention of Mannheim concerning Navigation on the Rhine, of October 17, 1868, which provides that jurisdiction concerning accidents of navigation on the Rhine lies exclusively with the Rhine Navigation Tribunals. The appellant admitted that Belgium was not originally a party to the Convention of Mannheim, but argued that it became a party thereto as a result of its ratification of the Treaty of Versailles of 1919, which was said to have imposed the régime of 1868 on the States thenceforward represented on the Central Commission for Navigation on the Rhine. The Court of first instance rejected the plea to the jurisdiction of the Belgian courts. On appeal, the Court of Appeal of Liége upheld the decision of the Court of first instance, by reference to the fact that the Convention of Mannheim of 1868 had not been published in Belgium and was accordingly not binding on Belgian nationals.[1]

The present action was a further appeal from that decision. It was argued on behalf of the appellant that no particular form of publication for international treaties was prescribed by law in Belgium, and that the Mannheim Convention was made obligatory in Belgium by the reference thereto in the Treaty of Versailles, which had been published in the *Moniteur belge*.

Held: that the appeal must be dismissed. Treaties, in order to be binding on Belgian nationals, must be published in the *Moniteur belge*. The Convention of Mannheim had not been so published.

The Court said: " Treaties, in order to bind Belgian nationals individually, must be brought to their notice. Admittedly no constitutional provision expressly lays down the way in which a treaty must be brought to the notice of Belgian nationals. However, since according to Article 68 of the Constitution a treaty has effect only after having received the assent of Parliament, the form of its publication, in the absence of special legal provision, cannot be other than the publication of the assent of Parliament, namely, the publication of the text in the *Moniteur*. The Court below found that the Convention signed at Mannheim on October 17, 1868, had not been published in the *Moniteur*."

[Report: *Pasicrisie belge*, 1954, I, p. 298.]

Treaties—Operation and Enforcement of—Treaty of Establishment—Condition of Compliance with Local Law.

See p. 338 (*Pieters* v. *Belgian State* (*Minister of Justice*)).

IV.—Constitutional Limitations

Treaties—Operation and Enforcement of—Whether Treaty Empowers Executive to Dispense with Constitutional Guarantees—The Law of Mexico.

Re RAMÍREZ.

Mexico, Supreme Court. September 7, 1953.

THE FACTS.—The applicant sought federal protection (*amparo*) against detention of his motor car by order of the Secretary of

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[1] See *Boileau* v. *Mélard and Wyckmans* (*International Law Reports*, 1952, Case No. 102).

Foreign Relations and other Federal authorities issued in pursuance of the provisions of the Convention of 1936 with the United States of America for the recovery and return of stolen motor vehicles.[1]

Held: that *amparo* must be granted. When enforcing provisions of a treaty, Government officials must observe the procedures established by the Constitution for the protection of individual rights.

The judgment is summarized in the report as follows: " Although it is true that according to Article 133 of the Constitution, treaties concluded with other States are the supreme law of the land, and that pursuant to Article 2 of the Treaty between Mexico and the United States relative to the return of vehicles stolen in the United States, the Secretary of Foreign Relations is required to take every proper means to bring about the recovery of such property, it is no less true that while treaties have the character of constitutional law, no treaty can have greater authority than the Constitution itself, which establishes certain guarantees which are the right of every individual. It must be understood that among the methods to which the Secretary of Foreign Relations may resort in the enforcement of the said Article 2, opportunity must be provided for judicial intervention, so that the individual concerned in the case may enjoy the right to a hearing which is guaranteed in Article 14 of the Constitution of the Republic. Where judicial proceedings have not taken place, there is a violation of Article 14 and *amparo* may properly be conceded."

[Report: *Semanario Judicial de la Federación* (5a Época), vol. 117, Part 1, p. 896.]

NOTE.—In 1953 similar judgments were handed down by the Supreme Court of Mexico in the following cases, which involve essentially the same situation and the same problem: *Re Fregoso* (*Semanario Judicial de la Federación* (5a Época), vol. 116, p. 613 (June 24, 1953)); *Re Peláyo* (*ibid.*, vol. 118, p. 73 (October 9, 1953)); *Re Rubio* (*ibid.*, p. 480 (November 11, 1953)); *Re Spada* (*ibid.*, p. 1402 (November 11, 1953)). These cases, together with four others which have been reported in earlier volumes of this publication[2], involved a conflict in the matter of interpretation between the administrative and judicial authorities in regard to the enforcement of the Convention with the United States for the recovery and return of stolen motor vehicles.[3] The specific cases arose out of the theft of motor vehicles in the United States and their transfer in Mexico to persons who apparently assumed that they had acquired *bona fide* titles; the vehicles were later detained by Government authorities for restitution to the original owners. In seizing motor vehicles in such circumstances, the administrative authorities interpreted Article 2 of the

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[1] *L.N.T.S.*, vol. 180 (1937–1938), p. 33.

[2] *Re Vera* (*Annual Digest*, 1948, Case No. 114); *Re Hernández del Valle* (*ibid.*, 1949, Case No. 109); *Re Conde* (*International Law Reports*, 1950, Case No. 6); *Re Valenzuela* (*ibid.*, Case No. 96).

[3] *L.N.T.S.*, vol. 180 (1937–1938), p. 33.

Convention, which provides that they will use " . . . every proper means (*todos los medios apropiados*) to bring about the detention of alleged stolen or embezzled motor vehicles . . . ",[1] to mean that the procedure of detention and return may be wholly of an administrative character. It was contended by the applicants in the various cases that such action violates Article 14 of the Constitution, which provides, *inter alia*, that " no person shall be deprived of . . . property, possessions, or rights without a trial by a duly created court in which the essential elements of procedure are observed and in accordance with laws issued prior to the act."[2] While a perfected treaty is law in Mexico according to Article 133 of the Constitution,[3] and while the Convention in question antedates the incidents which gave rise to the complaints, it cannot be construed to have greater authority as law than the Constitution. The Supreme Court has consistently ruled that where administrative action to enforce the Convention involves deprivation of private property, " every proper means " must include the judicial proceedings required by Article 14 of the Constitution.

VII.—Operation and Enforcement of Treaties. Necessity for Municipal Legislation

[*See also* PART I, INTERNATIONAL LAW IN GENERAL: IV, Relation to Municipal Law; *and* PART VI, THE INDIVIDUAL IN INTERNATIONAL LAW: A, In General.]

Treaties — Operation of — Executive Agreements — Executive Agreement Contravening Previous Statute—Unenforceability in Municipal Court—The Law of the United States of America.

UNITED STATES *v.* GUY W. CAPPS, INC.

United States, District Court, Eastern District, Virginia. September 7, 1951.

Court of Appeals, Fouth Circuit. April 15, 1953.

Supreme Court. February 7, 1955.

(Warren C.J.; Black, Reed, Frankfurter, Douglas, Burton, Clark and Minton JJ.)

THE FACTS.—This was an action instituted to recover damages alleged to have been sustained by the United States as the result of the alleged breach by the defendant of a contract with respect to the importation of seed potatoes from Canada.

Pursuant to the Agricultural Act of 1948, 62 Stat. 1247, the United States had committed itself to purchase from eligible potato growers, directly or through dealers, all table stock and seed potatoes that could not be sold commercially at a parity price. In order to protect the American market from an influx of potatoes grown in Canada, the United States and Canada agreed by an Exchange of Notes[1] of November 23, 1948, that Canada would place potatoes on the list of commodities for which export permits were required, and that export permits would be granted only for seed potatoes. The Agreement further provided that " Canadian exporters would also be required to have included in any contract into which they might enter with a United States seed potato importer a clause in which the importer would give an assurance that the potatoes would not be diverted or re-consigned for table stock purposes." The United States undertook not to impose any quantitative limits or fees on Canadian potatoes of the 1948 crop exported to the United States.

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[1] *Ibid.*

[2] Peaslee, *Constitutions of Nations* (1950), vol. II, p. 418.

[3] This Article provides: " This Constitution, the laws of Congress arising thereunder, and all treaties in accordance therewith already entered into or which, in the future, may be entered into by the President of the Republic, with the approval of the Senate, shall be the supreme law of the land." (Peaslee, *op cit.*, p. 459.)

The defendant, a United States corporation, entered into a contract in December 1948 with a Canadian exporter to purchase 48,544 sacks of Canadian seed potatoes, to be shipped to Jacksonville, Florida. The defendant's officers knew of the Agreement with Canada and stated in telegrams to the United States Department of Agriculture and to the exporter that the potatoes were for seed purposes. The defendant sold the potatoes while in shipment to an agency of a retail grocery organization. The Government's complaint averred that by selling the potatoes for table stock purposes, the defendant had forced the United States in its price support programme for potatoes to buy an equivalent quantity of table potatoes at $150,486, the sum now sought in damages.

On defendant's motion to dismiss,

Held (by the District Court): that the motion must be denied. The Exchange of Notes between Canada and the United States constituted an executive agreement having the force of law. The provisions of the Agricultural Act of 1948 (set forth in the opinion of the Court of Appeal) directing how the President might limit the entry of farm produce when he believed their import was injuring the support programme, did not restrict the President's powers to enter into the executive agreement. The United States was the direct beneficiary of the pledge against diversion incorporated in the contract, and had the right to sue on the promise. [Report: 100 F. Supp. 30.]

At the subsequent trial, the Court gave judgment for the defendant on the ground that there was no sufficient showing of breach of contract or damage to the United States. The Government appealed. On appeal,

Held (by the Court of Appeals): that the judgment for the defendant must be affirmed. The executive agreement was void because it was not authorized by Congress and it contravened the provisions of the Agricultural Act, 1948. Moreover, no cause of action existed whereby the Government could sue in a sovereign capacity to recover damages alleged to have been sustained as the result of the violation of a contract made between other persons.

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[1] Canada Treaty Series, 1948, No. 33; 62 United States Statutes at Large 3717; United States Treaties and Other International Acts Series No. 1896.

With regard to the validity of the executive agreement, the the Court said : ". . . . We think, however, that the executive agreement was void because it was not authorized by Congress and contravened provisions of a statute dealing with the very matter to which it related and that the contract relied on, which was based on the executive agreement, was unenforceable in the courts of the United States for like reason. We think, also, that no action can be maintained by the government to recover damages on account of what is essentially a breach of a trade regulation, in the absence of express authorization by Congress. The power to regulate foreign commerce is vested in Congress, not in the executive or the courts; and the executive may not exercise the power by entering into executive agreements and suing in the courts for damages resulting from breaches of contracts made on the basis of such agreements.

" In the Agricultural Act of 1948, Congress had legislated specifically with respect to the limitations which might be imposed on imports if it was thought that they would render ineffective or materially interfere with any program or operation undertaken pursuant to that act. Section 3 of the act, which amended prior statutes, provided in the portion here pertinent, 62 Stat. 1248–1250, 7 U.S.C.A. § 624:

' (a) Whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title . . . he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

' (b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such . . . quantitative limitations on any article or articles which may be entered . . . for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section . . . *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered . . . for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered . . . for consumption during a representative period as determined by the President: . . .'

" There was no pretense of complying with the requirements of this statute. The President did not cause an investigation to be made by the Tariff Commission, the Commission did not conduct an investigation or make findings or recommendations, and the President made no findings of fact and issued no proclamation imposing quantitative limitations and determined no representative period for the application of the 50% limitation contained in the proviso. All that occurred in the making of this executive agreement, the effect of which was to exclude entirely a food product of a foreign country from importation into the United States, was an exchange of correspondence between the Acting Secretary of State and the Canadian Ambassador. Since the purpose of the agreement as well as its effect was to bar imports which would interfere with the Agricultural Adjustment program, it was necessary that the provisions of this statute be complied with and an executive agreement excluding such imports which failed to comply with it was void. *Morgan* v. *United States*, 304 U.S. 1, 58 S.Ct. 773, 999, 82 L.Ed. 1129; *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 55 S.Ct. 241, 253, 79 L.Ed. 446. As was said by Chief Justice Hughes in the case last cited:

' We are not dealing with action which, appropriately belonging to the executive province, is not the subject of judicial review or with the presumptions attaching to executive action. . . . we are concerned with the question of the delegation of legislative power. . . .'

" It is argued, however, that the validity of the executive agreement was not dependent upon the Act of Congress but was made pursuant to the inherent powers of the President under the Constitution. The answer is that while the President has certain inherent powers under the Constitution such as the power pertaining to his position as Commander in Chief of Army and Navy and the power necessary to see that the laws are faithfully executed, the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress. It cannot be upheld as an exercise of the power to see that the laws are faithfully executed, for, as said by Mr. Justice Holmes in his dissenting opinion in *Myers* v. *United States*, 272 U.S. 52, 177, 47 S.Ct. 21, 85, 71 L.Ed. 160, ' The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power '. In the recent case of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 867, 96 L.Ed. 1153, the Supreme Court dealt with the question in the following pertinent language:

' Nor can the seizure order be sustained because of the several constitutional provisions that grant executive power to the President. In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute. The first section of the first article says that " All legislative Powers herein granted shall be vested in a Congress of the United States . . . ." After granting many powers to the Congress, Article I goes on to provide that Congress may " make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." '

" The rule was well stated by Mr. Justice Jackson in his concurring opinion in the case last cited as follows:

' When the President takes measures incompatible with the express or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive Presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.'

" We think that whatever the power of the executive with respect to making executive trade agreements regulating foreign commerce in the absence of action by Congress, it is clear that the executive may not through entering into such an agreement avoid complying with a regulation prescribed by Congress. Imports from a foreign country are foreign commerce subject to regulation, so far as this country is concerned, by Congress alone. The executive may not by-pass congressional limitations regulating such commerce by entering into an agreement with the foreign country that the regulation be exercised by that country through its control over exports. Even though the regulation prescribed by the executive agreement be more desirable than that prescribed by Congressional action, it is the latter which must be accepted as the expression of national policy.

" It is argued that irrespective of the validity of the executive agreement, the contract sued on was a valid contract between defendant and the Canadian exporter and that since the contract was made for the benefit of the United States, this country may maintain action upon it.[1] The answer is that the contract was but the carrying out of the executive agreement entered into in contravention of the policy declared by Congress; and the courts of the United States will not lend their aid to enforcing it against the public policy of the country so declared. As stated, the regulation of imports from foreign countries is a matter for Congress and, when Congress has acted, the executive may not enforce different regulations by suing on contracts made with reference thereto. . . ." [Report: 204 F. 2d 655.]

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[1] There is a holding to that effect in a decision of the United States District Court for the Eastern District of New York in the case of *United States* v. *Carpenter*, 113 F.Supp. 327.

The Government appealed to the Supreme Court.

Held (by the Supreme Court): that the decision of the District Court must be affirmed, on the ground that "the evidence was not sufficient to sustain the alleged breach of contract." The Court stated (*per* Burton J.) that it did "not reach or pass upon the other grounds discussed by the Court of Appeals."

[Report: 348 U.S. 296, 99 L.Ed. 329; 75 Sup. Ct. 326.]

NOTE.—The decisions reported above are discussed in Sutherland, "The Bricker Amendment, Executive Agreements, and Imported Potatoes", in *Harvard Law Review*, 67 (1953), p. 281, and have been noted in *California Law Review*, 43 (1955), p. 525; *Northwestern University Law Review*, 49 (1954), p. 95; and *Virginian Law Review*, 39 (1953), p. 687.

Treaties—Operation of—Warsaw Convention of 1929—Whether the Convention Creates of Itself a Right of Action.

KOMLOS *v.* COMPAGNIE NATIONALE AIR FRANCE.
ROYAL INDEMNITY CO. *v.* COMPAGNIE NATIONALE AIR FRANCE.

United States, District Court, Southern District, New York.
July 14, 1952.

Court of Appeals, Second Circuit. December 30, 1953.

THE FACTS.—The decedent, Komlos, a citizen of the United States and a resident of the State of New York, was killed in the crash of an Air France (Compagnie Nationale Air France) aeroplane in the Azores (Portugal). Under the Workmen's Compensation Law of New York, the Royal Indemnity Company had issued a policy covering Komlos and other employees of the corporation for which he worked. Upon the death of Komlos, the Company made payments under the policy to his mother. The Royal Indemnity Company then brought an action against Air France on the ground that under New York law it was the statutory assignee of the cause of action of the next of kin of the decedent. The administratrix of the estate of Komlos also brought an action against Air France for the death of the decedent. The defendant moved for summary judgment in the action brought by Komlos's administratrix, on the ground that the claim had passed to the Royal Indemnity Company by operation of law. In the Royal Indemnity Company action, the defendant moved to dismiss on the ground that both complaints were for recovery for wrongful death and that recovery could not be permitted on both causes of action. The administratrix for Komlos contended that the persons who have the right of action for wrongful death should be determined by the *lex loci delicti*, namely, the law of Portugal; that the Convention for the Unification of Certain Rules regarding International Air Transport, opened for signature at Warsaw, October 12, 1929 (the Warsaw Convention),[1] does not create a right of action; and that a right of action arising under Portuguese law would not pass to the insurer under the New York Compensation Act. The defendant contended that the cause of action was created by the Warsaw Convention; that the *lex fori* determines who have the right to bring the action; and that the New York Compensation Act had the effect of assigning the cause of action to the Royal Indemnity Company.

Held (by the District Court): that the defendant's motion for summary judgment must be granted in the action by the administratrix of Komlos for his wrongful death, and that the defendant's motion to dismiss the complaint in the Royal Indemnity Company action must be denied to the extent of the wrongful death action. The Warsaw Convention did not create a right of action for wrongful death, but only a presumption of liability from the happening of the accident. The Convention left to national legislation the questions of the persons who have the right to bring the action and of the rights thereof. Under the conflict of laws rule prevailing in New York, the persons having a right to bring the action for wrongful death must be determined by the *lex loci delicti*, namely, the law of Portugal. The law of that country would permit only a dependant of the decedent to share in the recovery. Under neither the law of New York nor of Portugal would the administratrix of the decedent be entitled to bring the action or to share in the recovery.

The Court said, with regard to the Warsaw Convention: "Counsel for defendant, Air France, contends that the Warsaw Convention created a cause of action '*ex contractu*'; and that the law of Portugal, the place of the accident, has no application. Counsel for plaintiff Komlos denies that the Convention created a new right of action. He argues that plaintiff's action is based on a tort and that it is created under the *lex loci delicti*, the law of Portugal, and that Portuguese law should be applied in determining who owns the right of action. Article 24 (2) of the Convention.

"In *Wyman* v. *Pan American Airways, Inc.*, 1943, 181 Misc. 963, 43 N.Y.S.2d 420, 423, affirmed 267 App.Div. 947, 48 N.Y.S.2d 459 and 293 N.Y. 878, 59 N.E.2d 785, certiorari denied 324 U.S. 882, 65 S.Ct. 1029, 89 L.Ed. 1432, the airplane was lost at sea. Judge Schreiber held that the applicable statute was the Federal Death on the High Seas Act. He stated:

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[1] 49 United States Statutes at Large 3000; *L.N.T.S.*, vol. 137, p. 11.

'The right to bring a death action is purely statutory. It did not exist at common law (*Debevoise* v. *New York, L. E. & W. R. R. Co.*, 98 N.Y. 377) and depends upon the existence of a statute creating a right of action at the place where the "force impinged" causing injuries and death. *Whitford* v. *Panama R. R. Co.*, 23 N.Y. 465; *Kristansen* v. *Steinfeldt*, 165 Misc. 575, 300 N.Y.S. 543, reversed on other grounds 256 App.Div. 824, 29. N.Y.S.2d 790. No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies. . . .

'The right to any recovery in this action thus must depend on some statute. The New York Decedent Estate Law, §130, can have no application as the injury and death did not occur within the territorial confines of the State. *Whitford* v. *Panama R. R. Co.*, *supra*. The only possible relevant statute, therefore, is the federal "Death on the High Seas Act". . .'

"Another case which discusses the Warsaw Convention is *Garcia* v. *Pan American Airways, Inc.*, 1945, 269 App.Div. 287, 55 N.Y.S.2d 317, affirmed 1946, 195 N.Y. 852, 67 N.E.2d 257, *certiorari* denied 329 U.S. 741, 67 S.Ct. 79, 91 L.Ed. 640. The following is quoted from Judge Hagarty's opinion, 269 App.Div. at page 292, 55 N.Y.S.2d at page 321:

'Inasmuch as the Convention, as a treaty, constitutes part of the law of this land, overriding state law and policies (U.S.Const, art. VI, clause 2; *Wyman* v. *Pan American Airways*, 181 Misc. 963, 43 N.Y.S.2d 420, affirmed 267, App.Div. 947, 48 N.Y.S.2d 459 [affirmed] 293 N.Y. 878, 59 N.E.2d 785, *certiorari* denied [324 U.S. 882] 65 S.Ct. 1029 [89 L.Ed. 1432]; *United States* v. *Pink*, 315 U.S. 203, 230, 231, 62 S.Ct. 552, 86 L.Ed. 796),[1] its provisions supersede the usual doctrine that the right and measure of recovery are governed by the *lex loci* and not by the *lex fori*. It comes to this: One is not bound to seek redress in the courts of this country. He may submit to the jurisdiction of the foreign state and, presumably, have his rights determined in accordance with the law of that place. That is not our concern. But if he institutes action here, the law which we will apply is that set forth by the terms of the Convention, even though it be inconsistent with the law of the place. Comity is abridged to that extent. *The Titanic*, 233 U.S. 718, 34 S.Ct. 754, 58 L.Ed. 1171; *Royal Mail S. Packet Co.* v. *Companhia de Nav. Lloyd Brasileiro*, D.C., 31 F.2d 757;[2] *The Mandu*, 2 Cir., 102 F.2d 459.'

"In *Ross* v. *Pan American Airways*, 299 N.Y. 88, 85 N.E.2d 880, 881, 13 A.L.R.2d 319, Judge Desmond states that the Warsaw Convention 'regulates and limits the liability of air carriers engaged in international transportation, as "international transportation" is defined in the Convention'.

"*Salamon* v. *Koninklijke Luchtvaart Maatschappij*, Sup., 107 N.Y.S.2d 768, 773, is a case relied on by defendant, Air France, to justify its contention that the Convention has created a new right of action. In that case the court used the following emphatic language:

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[1] See *Annual Digest*, 1941–1942, Case No. 13.]

[2] *Ibid.*, 1927–1928, Case No. 133.]

'If the Convention did not create a cause of action in Art. 17, it is difficult to understand just what Art. 17 did do.'

"The court's decision is on appeal to the Appellate Division, First Department.

"If an aerial flight comes within the Convention's definition of 'international transportation'[1] and the passenger is killed in the course of the flight, the provisions of the Convention attach to the right of action created by the *lex loci delicti*. Such was the situation in *Ross* v. *Pan American Airways, Inc., supra*, and *Garcia* v. *Pan American Airways, Inc., supra*. Both those actions arose out of the crash of an airplane in Portugal, at a time when Portugal had not yet adhered to the Convention. (At the time Emery Komlos lost his life in a crash, Portugal had already signified its adherence to the Warsaw Convention.) The defendant interposed defenses in its answers in the *Ross* and *Garcia* suits, which invoked the provisions of the Convention. In both cases the defenses were ruled valid. It matters not that a plaintiff does not allege that the cause of action is subject to the provisions of the Warsaw Convention. If the Convention applies, then plaintiff is restricted to whatever limitations the Convention placed on the right of action created by the *lex loci delicti*. *Ross* v. *Pan American Airways*, 299 N.Y. 88, at page 97, 85 N.E.2d 880, 13 A.L.R.2d 319.

"The ticket that was sold to Komlos for the fatal flight contained the following provision:

'The transportation effected under this passage ticket and the baggage check is subject to the rules of liability created by the Convention for the Unification of certain Rules Relating to International Transportation by Air, signed at Warsaw 12 October 1929 in so far as it concerns international transportation within the meaning of the said Convention.'

"The above provision was included in the passenger's ticket pursuant to Article 3 of the Convention, which provides:

'Article 3

'(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

. . . . . .

'(e) A statement that the transportation is subject to the rules relating to liability established by this convention.'

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[1] Article 1, subdiv. 2, defines international transportation as follows:

". . . 'international transportation' shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention." 49 Stat. 3014.

"This action for damages for the wrongful death of Emery Komlos is an action *ex delicto* not *ex contractu*. At common law there was no right of action for wrongful death, but many states and nations now grant the right to sue for wrongful death.

"The language of Articles 17, 20, 22 and 24 is such as is commonly associated with actions in tort, actions *ex delicto*. Article 17 clearly relates to a cause of action *ex delicto*. The fact that the passenger's ticket refers to the 'rules of liability created by the Convention' does not make the action '*ex contractu*'. The exoneration from liability provided for under Article 20(1) is a complete defense to the claim under Article 17 and the limitation of liability under Article 22(1) is a partial defense. But if the plaintiff can prove that the damage was caused by the carrier's 'wilful misconduct' then the defenses of exoneration and limitation are not available to the defendant carrier. Those defenses are not strictly speaking defenses '*ex contractu*'. They are in fact conditions attached to the 'cause of action'. The cause of action is created by the *lex loci*. The conditions which are attached thereto are created by the Warsaw Convention. The gravamen of the action is the negligence of the defendant which wrongfully caused the death of Emery Komlos. *Maynard* v. *Eastern Air Lines*, 2 Cir., 178 F.2d 139, 13 A.L.R.2d 646. The Warsaw Convention does not change the basic rule that the contract of carriage is not the gravamen of the action for wrongful death.

"I am of the opinion that the Warsaw Convention does not create a right of action for wrongful death. The Convention creates a *presumption* of liability from the happening of the accident. Art. 17. It gives the carrier complete exoneration from liability if the carrier can prove that it took all necessary measures to avoid the damage. It recognizes the *lex fori* doctrine of contributory negligence, Art. 21, assuming that under certain conditions a passenger's negligence might contribute to the damage. It grants a limitation of the liability of the carrier, Art. 22(1), to 125,000 francs (approximately $8,300) if the carrier is not entitled to exoneration from liability under Art. 20, and is not shown to be guilty of 'wilful misconduct', Art. 25, which caused the damage.

"That the Convention did not create any more than a presumption of liability is clear from the letter of Secretary of State Hull, dated March 31, 1934, addressed to the President, recommending the adherence of the United States to the Convention. The Secretary of State wrote:

> 'The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that

while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportaton.' See, U. S. Aviation reports, 1934, at p. 343.

" Judge Desmond discusses Secretary of State Hull's letter in *Ross* v. *Pan American Airways*, 299 N.Y. 88, at pages 97 and 98, 85 N.E.2d 880, at page 885, 13 A.L.R.2d 319, as ' creating a presumption of liability on the mere happening of an accident '.

"Article 17—*Injury to passenger.* 'The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.'

" In determining whether or not the Warsaw Convention creates a right of action for wrongful death, we should not consider Article 17 of and by itself alone. That article should be read together with Article 20(1) and Article 22(1) and Article 25(1). When Article 17 is thus read, it is apparent that the Warsaw Convention created only a presumption of liability (subject to a rebuttal and to limitation) as Secretary of State Hull described it, unless the damage was caused by the carrier's wilful misconduct, Art. 25(1), in which case ' the provisions of this Convention which exclude or limit his liability ' are not available to him.

" The effect of Article 17 of the Warsaw Convention seems to be this:

" If the decedent meets his death in the course of an ' international tansportation ', as that term is defined in Article 3 of the Convention, then if the place of the accident is within a nation that has not adhered to the Warsaw Convention and has its own statute for wrongful death actions, the conditions and limits of the Convention, including Article 24(2), would nevertheless be applied in a suit for wrongful death in a forum specified as a proper forum under Article 28 of the Convention. But if the law of the place of the accident does not provide for a right of action for wrongful death, the forum would apply Article 17 of the Convention, and under those circumstances it might be said that Article 17 created the right of action for wrongful death. Under those circumstances, it may also be said that the right of action, even though its gravamen is ex delicto, arises out of the contract of carriage which made the Rules and Regulations of the Warsaw Convention applicable to the international transportation.

"If the *lex loci delicti* does provide for a right of action for wrongful death and if the nation controlling the *locus* has not adhered to the Warsaw Convention, then that nation within its own Courts would be free to apply its own law in relation to wrongful death regardless of the provisions of the Warsaw Convention if an action is commenced within its own courts. *Garcia* v. *Pan American Airways*, 269 App.Div. 287, at page 292, 55 N.Y.S.2d 317. But if the place of the accident is within a nation that has adhered to the Warsaw Convention, and if the local law there has no provision for an action for wrongful death, the provisions of the Convention would nevertheless be applied within that nation if that nation is a proper forum in which to bring the action under Article 28 of the Convention, because the Convention would be the supreme law in relation to actions for wrongful death in the course of international transportation by air.

"Although the Warsaw Convention attached a number of conditions to the right of action created by the *lex loci*, the Convention did not prescribe the person or persons who may bring the suit, or the person or persons who have a right or interest in the suit. Article 24 states:[1]

'(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

'(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.'

"Apparently the Convention had no intention of legislating on a matter it deemed a proper subject for national rather than international legislation. But the Convention does specify various forums in which the action for damages may be brought. The law of the forum selected by the plaintiff would determine who had the right to bring the suit. This duty is in keeping with certain other duties explicitly imposed on the forum by the Warsaw Convention. See Articles 22, 25, 28 and 29.

"As late as the final session of the Convention the Swiss delegation proposed that subdivision 2 of Article 24 should provide:

'The classes of persons who are authorized to receive the sums due from the carrier on a suit for damages, are determined by the national law of the deceased.'

The amendment was rejected in favor of the final wording. Thus the Convention has left open the question as to whether the *lex fori* or the *lex loci delicti* should determine which person or persons has the right of action created by the Convention; and their respective rights, if there is a conflict of law between the *lex fori* and the *lex loci* in that respect. A United States District Court sitting in the State of New York must apply the conflict of laws doctrine prevailing in the New York State courts. *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 85 L.Ed. 1477.

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[1] Article 18 relates to damage to goods and baggage; Article 17 to claims for bodily injury or the death of a passenger; Article 19 to claims for delay in the transportation of passengers, baggage, or goods.

" Ordinarily the *lex loci delicti*, the place where the accident occurs, creates the right of action and determines also who has the right of action and among whom the amount recoverable shall be distributed. Goodrich on Conflict of Laws, § 105, p. 302. *Pennsylvania R. Co.* v. *Levine*, 2 Cir., 263 F. 557; Restatement of Conflict of Laws, § 393. As to who may bring the suit, Goodrich holds: 'Unless the statute (of the *lex loci delicti*) limits suit to named beneficiaries, or a particular administrator or personal representative, an administrator appointed at the forum may institute the action'. *Teti* v. *Consolidated Coal Co.*, D.C.N.D.N.Y. 1914, 217 F. 443; *Leonard* v. *Columbia Steam Navigation Co.*, 84 N.Y. 48. In the case at bar the administratrix was appointed by the Surrogate's Court, New York County, the place of decedent's domicile. Under the law of New York she is empowered to bring an action for wrongful death. Her right to do so is recognized by the law of Portugal.

" Article 28 (2) of the Warsaw Convention provides that 'Questions of procedure shall be governed by the law of the court to which the case is submitted'. That is in accord with the New York conflict of laws doctrine. . . ."

(The Court then proceeded to a consideration of the issues of private international law involved in the case.) [Report: 111 F. Supp. 393.]

On appeal,

Held (by the Court of Appeals): that the decision of the Court below must be reversed. Under the law of Portugal the administratrix of the decedent could sue as nominal plaintiff on behalf of a dependant of the decedent. The deceased's sole dependant, his mother, had an action for " moral damages " under Portugese law, which was not assigned to the Royal Indemnity Company, and an action could accordingly be maintained on the mother's behalf in order to avoid splitting the cause of action. No reference was made to the Warsaw Convention.

[Reports: 209 F.2d 436; *certiorari* denied, 348 U.S. 820, 75 Sup. Ct. 31, 99 L.Ed. 646 (1954).]

Treaties—Operation of—Interpretation of Municipal Statute in the Light of Relevant International Coventions—International Convention on Declaration of Death of Missing Persons, 1951—Municipal Law Implementing International Convention—The Law of Israel.

ATTORNEY-GENERAL *v.* KANE AND BARON.

Israel, Supreme Court sitting as the Court of Civil Appeals.

(Ollshan, Silberg and Zussman JJ.)

February 9, 1953.

THE FACTS.—After Israel had become a party to the International Convention on Declaration of Death of Missing Persons, concluded at New York on April 6, 1950, a domestic law—the Declarations of Death Law, 1952[1]—was passed. The short point in this case—concerning which the lower Courts had at various times rendered conflicting opinions—was whether the Law of 1952 adds to, or derogates from, the law as previously in force and relating to evidence of death. In this case the Court below had decided that the Law did not provide an exclusive code of evidence for these questions, and the Attorney-General appealed against that decision.

Held: that the appeal must be dismissed. The Law of 1952 and the Convention were each to be interpreted in the light of the special situation of the Jews following the death or disappearance of more than six million Jews during the Second World War.

The Court said (*per* Silberg J.): " In the course of the proceedings before us, Mr. Gluckman, for the appellant, made many interesting points as to the practical purpose of the Law, its exclusive character, and its relation to the international Convention on which it is based, but in my opinion—to which Mr. Gluckman eventually agreed—the debate may be confined to one single point, *viz.*, whether the provisions of the said Law, even admitting its exclusive character, apply also to cases in which the question of the death of the missing person is merely *incidental*, that is to say, is a question whose determination is merely a prerequisite to a decision on another matter.[2] Mr. Gluckman agrees that in the case of an application for a succession order—as distinct from an application for a declaration of death—the question of the death of the deceased (and of his other or possible heirs) is incidental, since the Court established the death merely for the purpose of the distribution of the estate or, more exactly, of the estate situated within the country; he maintains, however, that the exclusivity of the Law extends also to these cases, and that, since its promulgation, the death of a missing person can only be proved (by indirect evidence) in the manner provided by that Law. Otherwise, Mr. Gluckman continues, duplication and *conflict* of proceedings would result, defeating the international purpose of the Law and the Convention (see s. 12 of the Law and the Preamble to the Convention).[1]

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[1] English translation in *Laws of the State of Israel*, vol. 6, 5712–1951/2, p. 40.

[2] Elsewhere in the judgment the word " incidental " in this context was more closely defined as meaning the establishment of the fact of death not as the substance of the order of the Court, but as the reason for some other order, *e.g.*, a succession order.

" I am not prepared to accept that contention, and that for the very reason put forward by Mr. Gluckman himself. For that purpose we must examine the provision of s. 5 of the Law. In my opinion, the section shows conclusively that this contention cannot prevail. The section reads as follows:

> ' The Court shall, upon the application of an interested person or of the Attorney-General or his representative, declare the death of a missing person if—
>
> (1) he had his last domicile or residence in Israel; or
> (2) any of his property is situated in Israel; or
> (3) he disappeared in Israel; or
> (4) the applicant has his domicile or residence in Israel and is any of the following relatives of the missing person:
>
> a spouse, an ascendant, a descendant, an adopted child or a descendant of an adopted child, a brother or a sister or a descendant of a brother or a sister, an uncle, an aunt.'

Now, it is well known that in almost all applications for a succession order respecting missing persons of the Second World War, the most difficult and complicated question is not the fact, but the date, of the death of the owner of property, and also the times and order of the deaths of subsequent successors in title who either, like the links of a chain, connect the deceased owner abroad with the local claimant in title, who is also the applicant for the succession order, or alternatively snap those links entirely. For instance, Reuben, the owner of property in Tel-Aviv, and his family were killed in a Nazi extermination camp. Reuben had been married to a woman named Leah. His brother, Simon, a resident of Israel, applies to the District Court of Tel-Aviv for a succession order. Simon contends and sets out to prove, by indirect evidence, that Reuben's wife *predeceased* him and thus inherited nothing, so that the *whole* estate passes to the heirs of the husband, while the heirs, if any, of the wife have no claim at all. The question arises how, under the said law, can Simon obtain a declaration of the death and date of death of his brother's wife. She does not come within any of the categories mentioned in section 5: her last domicile or residence was not in Israel (para. 1); according to the applicant, she predeceased her husband, and even apart from this, she never had any property in Israel (para. 2); she did not disappear in Israel (para. 3);

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[1] By s. 12 of the Law, declarations of death issued in conformity with the provisions of the Convention shall constitute in Israel *prima facie* evidence of death and the day of death.

and the applicant, Reuben's brother Simon, does not stand to Reuben's wife Leah in any of the degrees of relationship enumerated in para. 4, while Leah's own relatives do not figure in the case at all.

" If the contention of the appellant were correct, the result, with regard to the above case, would be that the fact and date of *Reuben's* death would have to be proved, in accordance with the Declarations of Death Law, in the District Court of *Jerusalem;* and the fact and date of Leah's death in the District Court of *Tel-Aviv* in the course of the hearing of the application for the succession order. Could there be a greater measure of duplication ? The contradictions and complications likely to arise from such a fragmentation of evidence are obvious, and it is certainly much more logical and practical not to divide what naturally belongs together, but to leave the establishment of both deaths, of the husband and of the wife, to the Court dealing with the application for the succession order.

" The above example is comparatively simple. We might, without departing from reality, provide a much more complicated one by referring to cases, which are of almost daily occurrence, where the applicant has to prove the sequence of the deaths of dozens of persons from different families and localities, linked by extremely involved genealogical ties—for the Germans destroyed six million Jews. Whatever be the purpose of the International Convention on the Declaration of Death of Missing Persons or its practical value to the members of other nations, it is inconceivable that the Israeli legislator, aware of the magnitude of the national disaster that has befallen us, should have intended to create, precisely for our people, artificial difficulties of the kind mentioned. Therefore, with all due deference to the Declarations of Death Law, and though it may be exclusive with regard to applications *specifically* aiming at a declaration of death of a missing person, it certainly is not exclusive with regard to the *incidental* establishment of the death of a missing person, nor does it prevent the issue of a succession order by an ordinary District Court on the strength of indirect evidence of the death of the missing person. Of course, such incidental proof of death has not the same effect as a specific declaration of death under the new Law; it has no international validity—by virtue of the Convention and the laws based thereon—in the countries signatories to the Convention, and it does not, for instance, require communication to the International Bureau under sections 9 and 11 of the Law. But precisely because of its restricted scope and its ' relativity ' it does not trespass upon the ground of the ' international ' declaration of death based on the Convention, nor upon the exclusivity, if any, of the Law.

" In conclusion, reference may be made to an historical reference to throw light on the problem before us. From Robinson's *United Nations Convention on the Declaration of Death of Missing Persons,* *A Commentary* (New York, 1951), to which Mr. Gluckman has directed our attention, we gather that the United Nations Conference, when drafting the Convention, discussed the question of its exclusivity or, more exactly, of the exclusivity of the laws based on it. The negators of exclusivity held that

" ' . . . the Convention created a special régime for declarations of death which were in the main to be used in international relations and that there was no reason why an applicant whose interests lay exclusively within the territory of a certain country must abide by the stipulations of the Convention and not be able to use the less complicated system of domestic law. They argued that the aim of the Convention was to facilitate, not to complicate, matters for the applicants, and that this aim could not be achieved otherwise than by leaving to the applicant the choice of the procedure under the Convention or of the applicable local law . . . ' (at pp. 81–82).

That was the opinion of almost all the members (p. 83). It is not, however, shared by Dr. Robinson, who formulates his point of view as follows:

" ' If it were possible to file one application for a declaration of death of a missing person under the Convention and another under domestic law, there would exist two or even more declarations having the same validity within the issuing country, but possibly differing in respect to the date of death . . . This would mean that the same State in one procedure held a person to be alive and in another procedure, before the same authorities, and possibly even at the same time (if both applications ran parallel), declared him to be dead. It is sufficient to envisage the complications which would arise from declarations with varying dates of death, one granting the right to inheritance to some persons and the second to others . . . and the situation of [a] person being at the same time dead and alive, to realize that a parallelism of ' Convention ' declarations and ' domestic law ' declarations would not be compatible with either the aims of the Convention or public order in any State.' (At pp. 83–84.)

" A most trenchant piece of reasoning. But what follows from it, even without taking into account that it is merely the view of an individual ? Nothing more, in my opinion, than that co-existence of the local law and the International Convention cannot be permitted with regard to direct declarations of death, *i.e.*, declarations having *equal legal effect*; but this is not essential, for the Court will not be authorized to apply the provisions of the local law when the determination of the death is merely a means enabling it to reach a particular, limited, decision in *another* matter before it. I am well aware that even such a limited decision, for instance, an order of succession issued by the ordinary District Court after determining the chronological order of deaths, may possibly prejudice the general validity of a direct declaration of death issued later by the special District Court (the Jerusalem Court) after it has established a *different* order of the deaths; because that relative who will be entitled to the estate according to the facts established in the second judgment will not obtain his share of the estate unless the first Court will be prepared to revise its Order in the manner provided by Rule 25 of the Succession Rules. But this cannot be avoided so long as we adhere to the important principle of *res judicata.* In any event, this difficulty is negligible compared with the tremendous difficulty bound to arise in innumerable cases through the provision of the above-quoted section 5, unless we were to set some limits to the incidental establishment of the death.

"I would, therefore, dismiss the appeal."

[Reports: *Piskei-Din*, vol. 7 (1953), p. 107; *Pesakim Elyonim*, vol. 12 (1953), p. 117.]

Treaties—Operation of—Conflict between Treaties—Overriding Effect of Later Treaty—The Law of Argentina.

CÍA. TERRITORIAL DE SEGUROS (S.A.) *v.* THE *CLARA Y.*

Argentina, Cámara Nacional Especial. May 4, 1953.

THE FACTS.—This was an action to determine whether or not lapse of time barred arbitral proceedings in a case concerning damage resulting from a collision on the River Paraná between the Argentine vessel *Churrinche* and the Uruguayan motor vessel *Clara Y*, while the former was being towed by the Argentine motor vessel *Aquatera.* The Compañía Territorial de Seguros (S.A.) as insurer of the *Churrinche*, together with the owner, contended that according to the Montevideo Convention of 1879 the matter of prescription was governed by the law of the place of collision, *i.e.*, Argentina, and that, therefore, the rule of prescription of one year provided for in Article 4037 of the Civil Code and Article 852 of the Commercial Code should be applied. The owner of the *Clara Y* invoked the rule of prescription of two years provided for in the Brussels Convention of 1910, by which Argentina was also bound. The case was brought on appeal.

Held: that the action was not barred by lapse of time. Where there is a conflict in the provisions of two treaties, the more recent treaty will be applied. The Court pointed out that with regard to prescription in a case involving a maritime collision, there was a conflict between the provisions of Article 4037 of the Civil Code and Article 852 of the Commercial Code, applicable in the instant case according to the rule of the Montevideo Convention of 1879, and the provisions of the Brussels Convention of 1910. It stated that according to "the classical principle a later legislative act will supersede an earlier one in so far as there is conflict between the provisions of the respective acts". The Brussels Convention could be invoked in a collision case if the vessels involved were of diverse nationality and one, at least, qualified as an ocean-going ship. The

Court found that the vessels were of Argentine and Uruguayan registry and that the *Clara Y* qualified as an ocean-going ship; therefore, the Brussels Convention was applicable in this case; its provisions regarding a two-year rule of prescription superseded those of the Civil and Commercial Codes; and arbitral proceedings could be undertaken as less than two years had elapsed between the collision and the initiation of these proceedings.

[Report: *Revista Jurídica Argentina La Ley*, vol. 71 (July-September 1953), p. 222.]

Treaties—Operation and Enforcement of—Effect of Prior Acts of International Body—Treaty of Peace with Italy, 1947, and European Central Inland Transport Organization.

See p. 481 (*French State Railways Claim*).

Treaties—Operation of—Variation of Terms of Multilateral Treaty by Two Signatories—Substitution of Award of Conciliation Commission for Agreements Prescribed by Treaty.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Operation and Enforcement of—International Law and Municipal Law—Charter of the United Nations—The Law of the United States of America.

See p. 244 (*Rice* v. *Sioux City Memorial Park Cemetery*).

Treaties—Operation of—Effect of Executive Order Requiring Deposit of Bequest in a Blocked Account—Function of Consul.

See p. 386 (*In re Braier's Estate*).

Treaties—Operation and Enforcement of—Supremacy of Subsequent Municipal Law.

See p. 328 (*Compulsory Acquisition* (*Greece*) *Case*).

VIII.—Effect of Treaties on Third Parties

Treaties—Operation of—Effect on Private Persons—Assignment to Government of Claims of Private Persons—Services Rendered to Agency Acting on Behalf of Belligerent Occupant—Claim to Remuneration for Services Not Satisfied on Cessation of Occupation—Claim Vested in Government of Formerly Occupied Country by Virtue of the Paris Reparations Agreement, 1946—Right of Claimant to Institute Proceedings for Payment of Remuneration.

Reparations Agreement (Germany) Case.

German Federal Republic, District Court of Mannheim. May 8, 1953.

The Facts.—The plaintiff, a French national, had rendered certain services to the defendants at a time when the latter were acting as agents for the German Occupant in Alsace Lorraine during the Second World War. The plaintiff had not been paid for these services when the German occupation of Alsace Lorraine came to an end, and he now brought an action against the defendants for payment of the remuneration still outstanding. The defendants denied the plaintiff's right to bring the action, on the ground that, by virtue of the Paris Reparations Agreement of 1946, all claims against, *inter alia*, former agencies of the German Government in occupied territories had vested in the Allied Governments concerned, and that accordingly the plaintiff's claim was now vested in the French Government.

Held: that the plaintiff was not entitled to bring this action, as his claim had vested in the French Government.

The Court said: " The Agreement [of 1946] is also binding on French nationals who are private creditors. The Agreement was ratified by France as early as February 13, 1946. A French Law enacted on March 5, 1946, expressly incorporated the substantive contents of the Reparations Agreement into binding French municipal law. It follows that we must reject the plaintiff's view that the Agreement is no more than *res inter alios acta* and of no effect so far as concerns the legal relations between the parties. German civil law does not constitute an obstacle to the transfer to his own Government of the claim of the French plaintiff, because an assignment without the observance of any prescribed form is permissible by German law. A *cessio legis* is therefore, *a fortiori*, permissible. Nor does international law constitute an obstacle to such transfer. In any event, there are no rules of international law to negative the efficacy of the French legislation here referred to, the more so as the legal consequences resulting from the application of the Reparations Agreement do not constitute an expropriation without payment of compensation, but a *cessio legis*, having regard to the fact that, in accordance with the provisions of a Law implementing the Law of March 5, 1946, a French creditor is entitled to register the claim which has been extinguished with the French Sequestrator, in order that an indemnity of an equal amount may be obtained. . . . As in view of the foregoing the requirements of French law and the Reparations Agreement are satisfied, the plaintiff had to be regarded as no longer entitled to assert the claim in these proceedings."

[Report: NJW, 6 (1953), p. 1833.]

Treaties—Operation and Enforcement of—Treaty Affecting Private Property Rights—Whether Municipal Legislation Required—" Pay As You Go " Agreement between Austria and United States of America.

" PAY AS YOU GO " AGREEMENT (AUSTRIA) CASE.

Austria, Supreme Court. April 29, 1953.

THE FACTS.—By virtue of the so-called " Pay As You Go " Agreement of June 21, 1947, between the United States of America and the Republic of Austria (*U.N.T.S.*, vol. 67, p. 99) the Government of the United States de-requisitioned, as from June 30, 1947, all property in Austria previously requisitioned for the use of the United States army of occupation. The Government of the Republic of Austria, for their part, agreed to the continued user by the United States forces of the properties so de-requisitioned and undertook to grant leases thereof to the United States authorities. The plaintiffs, owners of one of these properties, now brought an action against the Austrian Government, claiming accounts of all rents received by the latter from the United States authorities for the user of their, the plaintiffs', property. The Austrian Government contended that they were entitled to grant leases of the plaintiffs' property without the plaintiffs' consent, and that they were accordingly not bound to render accounts of the rents received.

Held: that as the Austrian Government had acted without the consent of the owners and had held themselves out as the agents of the latter, without being authorized in that behalf, they must be regarded as unauthorized agents within the meaning of the Civil Code; as such they were under a duty to render accounts of all rents received.

The Court said: " The claim of the plaintiffs is based on the legal concept of ' unauthorized agency ', namely, the grant by the defendants, as trustees, of a lease of the plaintiffs' house to the American military government. For the determination of this claim the relationship between the defendants and the Occupying Power is immaterial. It is equally immaterial whether the so-called ' Pay As You Go ' Agreement was concluded by the defendants in the exercise of sovereign functions. All that is material is the fact that the lease was granted by the defendants, as trustees of the plaintiffs, and that the defendants held themselves out, *vis-à-vis* the Occupying Power, as the plaintiffs' trustees, and that the plaintiffs base their claim on the defendants' ' unauthorized agency ', the more so as the defendants had no right, public or private, to make this contract on behalf of the plaintiffs. . . . The fact that the plaintiffs' house would have been used by the Occupying Power even in the absence of any lease having previously been concluded in respect thereof has no bearing on the question whether the plaintiffs can derive rights from the ' unauthorized agency '. The defendants concluded the agreement on behalf of the plaintiffs, without being in law entitled so to do. They did not act in a governmental capacity on the basis of existing law, but as unauthorized agents, and their liability must be determined solely in accordance with the relevant provisions of the Civil Code."

[Report: " Der Staatsbürger ", September 1, 1953, p. 2.]

Treaties—Operation and Enforcement of—Claims of Individuals on Basis of Treaty—Claims Settlement Agreement between Austria and United States of America—Contents of Treaty Not Enacted as Municipal Law—Failure of Government to Submit Treaty to Parliament for Purpose of Enactment—Whether Individuals Entitled to Claim Damages for Failure of Government—The Law of Austria.

IRRESBERGER *v.* REPUBLIC OF AUSTRIA.

Austria, Landesgericht of Vienna. May 20, 1953.

THE FACTS.—By a judgment dated February 20, 1952, the Austrian Supreme Court held that Austrian nationals who had suffered damage as a result of torts committed by members of the United States armed forces were not entitled to recover compensation for such damage from the Republic of Austria, which, by virtue of the " Claims Settlement Agreement " of June 21, 1947, concluded between Austria and the United States of America (*U.N.T.S.*, vol. 67, p. 89), had received a global sum of money from the United States Government and in consideration thereof had undertaken to satisfy all claims of Austrian nationals in respect of such damage (if caused before July 1, 1947).[1] The reason given by the Supreme Court for the dismissal of individual claims of this nature against the Republic of Austria was the absence of any Austrian law embodying the contents of the Agreement. It appeared, in fact, that the Austrian Government had never submitted the Agreement to the Austrian Parliament (as required by Article 50 of the Constitution) in order that it may be enacted as part of Austrian municipal law, and in the present action the plaintiff claimed damages from the Republic of Austria, his contention being that the Austrian Government had failed in its constitutional duty and was guilty of a violation of Austrian law.

Held: that the Austrian Government, in failing to submit the Agreement to the Austrian Parliament, had failed in its constitutional duty and had acted *contra bonos mores*, and that the plaintiff was accordingly entitled to damages.

The Court said: " In so far as concerns a legal duty to act, the provisions of civil law must be applied, as provided in section 1 of the Law concerning the liability of the public service. In accordance with section 1039 of the Civil Code a person must bring to a conclusion a transaction which he has undertaken on behalf of another without the latter's authority. The Government, without the authority of the plaintiffs, undertook to provide for the settlement of their claims to compensation. It was therefore under a duty to bring this transaction to a final conclusion as far as lay in its power, and in any event to submit the treaty to Parliament for approval. In failing to bring to a final conclusion the transaction thus undertaken, the Government violated a legal duty and thus acted contrary to law. The unlawful nature of this omission also derives from a different consideration, namely, that the Government received the money which was paid in consideration of the waiver of direct claims for compensation and guaranteed to use this money for its intended purpose. In relying now on the ineffectiveness of the Agreement as against persons who have suffered damage—such ineffectiveness having been caused by the Government itself—the Government is acting *contra bonos mores*. The basic concepts of morality apply as much to the organs of public administration as to private individuals, and any act or omission which may in any way appear to be contrary to morality must be scrupulously avoided."

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[1] *Cf. Pokorny and Another* v. *Republic of Austria*: *International Law Reports*, 1952, Case No. 98.

[Report: *Salzburger Nachrichten*, June 20, 1953.]

Treaties—Effect on Third Parties—Military Bases Agreement—Nationals within Foreign Military Base—Persons Subject to Jurisdiction of Foreign Military Courts—Rights of Individuals under Bases Agreement—Rights under Agreement as Inuring Only to States.

See p. 148 (*The People of the Philippines* v. *Segundo M. Acierto*).

C—TERMINATION OF TREATIES

II.—By Act of Party

ii.—Mutual Consent. Revision of Treaties

Treaties—Termination of—By Act of Party—Abrogation of Treaty by a Subsequent Treaty.

See p. 328 (*Compulsory Asquisition* (*Greece*) *Case*).

D—INTERPRETATION OF TREATIES

I.—Agencies of Interpretations

Treaties—Interpretation of—Agencies of—Interpretation by Parliamentary Report of Signatory Government—Interpretation by Reference to " Traditional Policy " of Signatory Government—Interpretation by Reference to Prior Similar Treaty.

MILJUS CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—The claimant was the holder of dinar bonds issued by the Yugoslav Government, on which that Government had defaulted. Article 4 (c) of the Agreement between the Governments of the United States of America and Yugoslavia regarding " pecuniary claims of the United States and its Nationals " provided:

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n.1.

> " (c) The Government of Yugoslavia recognizes the obligation of the successor enterprises created by it with respect to debts valid under Yugoslav law which were incurred prior to the nationalization or other taking, for the benefit of the enterprises nationalized or otherwise taken, provided, however, that there shall be deemed fully settled and discharged all debt obligations of enterpises, nationalized or otherwise taken, owing to nationals of the United States whose claims against the Government of Yugoslavia with respect to the nationalization or other taking of such enterprises are claims which are fully settled and discharged by this agreement; . . . "

Other relevant facts appear from the *Held* below.

Held: that the claim must fail. Claims based on dinar bonds were not within the Yugoslav Claims Agreement of 1948.

The Commission said: " The claimant's rights as to the bonds are contractual with the Government of Yugoslavia. The failure of that Government to pay the bonds in the past, or to provide for their full payment in the future, presents the question as to whether such contractual rights are compensable under the agreement of July 19, 1948, between the Governments of the United States and Yugoslavia. We are of the opinion that they are not.

" The agreement does not specifically mention dinar bonds. In Article 4 (c) Yugoslavia recognizes the obligation of successor enterprises created by it (in effect, the Government of Yugoslavia itself) to pay debts owned by nationalized enterprises (private business corporations). In Article 10 (a) Yugoslavia authorizes persons residing in that country, who are legally indebted to private parties in the United States, to pay such obligations at maturity. Also, in notes exchanged between the Governments of the United States and Yugoslavia on the same date the agreement was executed, the latter Government recognized ' among its other international obligations, the dollar bonds issued or guaranteed by predecessor Yugoslav Governments '. Thus, three categories of American creditors (including dollar bondholders) were specifically excluded from participation in the fund created by the agreement, but were protected to the extent that the Yugoslav Government gave assurance that such obligations would be treated as subsisting. However, we do not believe that the failure to mention dinar bonds is subject to the interpretation that they are compensable under the agreement. This view is buttressed by the fact that the Government of Yugoslavia had enacted legislation before the agreement was signed which provided for the payment of dinar bonds at 10 per cent. of their face value, provided the same were registered in accordance with its laws. This view is further buttressed by the Senate report on the bill which became the International Claims

Settlement Act of 1949 (Public Law 455, 81st Cong.), which reflected the views of State Department officials who had testified regarding the intent of the negotiators of the agreement. That report contains the following statement with respect to debt claims:

" ' The Yugoslav Claims Agreement of 1948 is a settlement of a defined category of claims. In consideration of the payment of $17,000,000, the Yugoslav Government was discharged of obligation with respect to such claims. Claims not settled were not discharged and remain unsettled obligations of Yugoslavia. For example, the Yugoslav Government is not released as to nationalization or other taking after July 19, 1948. Thus, also, the claims settled do not include creditor interests. They are confined to ownership interest in property, either legal or beneficial, direct or indirect. This is consistent with traditional United States policy in connection with espousal (S. Rept. 800, 81st Cong., 1st sess., Calendar No. 810, p. 11).'

" This view is further and fully substantiated by the traditional policy of the United States Government not to espouse claims against foreign governments for defaulted government bonds, which has been stated as follows:

" ' . . . while the situations created by default on foreign bonds, whether partial or complete, are given constant study by the Department of State, it has been the policy of this Government to consider them primarily matters for direct negotiation and settlement between the foreign debtors and the American bondholders or their representatives. American citizens who purchase such obligations do so upon their own responsibility and at their own risk. While the Department is always glad to facilitate settlements in such cases when possible, it has long been the policy of the Department, repeatedly stated by various Secretaries of State, generally to decline to intervene in the enforcement of such obligations, save under very exceptional circumstances, as, for example, where American nationals are discriminated against in connection with payments made by a foreign government on its obligations. (The Assistant Secretary of State, Welles, to Samuel O. Leslie, June 14, 1935, MS. Hackworth, *International Law Digest*, Vol. V, pp. 625–26.) '

" When the United States Government departs from that policy and enters into a Convention for the settlement of defaulted obligations of a foreign government, appropriate language is inserted in the convention. For example, in the convention of September 8, 1923, with the Government of Mexico, provision was made for the settlement of ' all claims ' (Hackworth, *International Law Digest*, Vol. V, p. 618). Since the agreement with Yugoslavia provided only for the settlement of claims for the ' nationalization and other taking by Yugoslavia of property and of rights and interests in and with respect to property, which occurred between September 1, 1949, and the date hereof ' (July 19, 1948), we conclude that the failure to include dinar bonds was not inadvertent and that such bonds were omitted intentionally."

[Report: *Settlement of Claims*, 1949–1955, p. 37.]

NOTE.—For rejection of a claim based on bonds issued before 1914 by Serbia, Bosnia-Herzegovina and Austria-Hungary, see the *Kaufman Claim*: *ibid.*, p. 39.

Treaties—Interpretation of—Agencies of Interpretation—Requirement of Foreign Office Certificate—The Law of France.

PROCUREUR GÉNÉRAL OF THE COURT OF APPEAL OF PAU *v.* ARA-ARROYOS

France, Cour de Cassation. March 24, 1953.

THE FACTS.—A French Decree of November 12, 1938, provides that an alien carrying on trade in France without being in possession of a trading permit is guilty of an offence. The respondent, a Spanish national, was acquitted of a charge laid in pursuance of this Decree, notwithstanding the fact that he had carried on trade without being in possession of a permit, on the ground that by virtue of the Franco-Spanish Treaty of January 7, 1862, the subjects of each Contracting Party were entitled, in the territory of the other, to carry on trade provided only that they observed the conditions applicable to nationals. The Public Prosecutor appealed against the acquittal and contended that the Court of Appeal should not have determined the case on the merits without first obtaining the views of the Ministry for Foreign Affairs on the following questions: (i) whether the Franco-Spanish Treaty of 1862 exempted Spanish nationals from the requirement of holding trading permits, a requirement applicable to foreign nationals generally; and (ii) whether French nationals in Spain were entitled, on the basis of reciprocity, to carry on trade without first obtaining trading permits from the Spanish authorities.

Held: that the contention of the Public Prosecutor must be upheld and the acquittal set aside; the views of the Ministry for Foreign Affairs must be ascertained before the case could be decided on the merits.

The Court said: "Ara-Arroyos, a Spanish subject, was prosecuted for carrying on trade in France without being in possession of a special identity card headed 'trader', and which is issued by the executive authorities; this is an offence punishable by the Decree of November 12, 1938. The accused was acquitted although the facts alleged against him were not disputed. In support of its decision the Court of Appeal relied on the Franco-Spanish Treaty of January 7, 1862, whereby the subjects of each Contracting Party are entitled to carry on trade in the territory of the other, provided only that they observe the conditions imposed on nationals by the legislation in force at the date of the alleged offence. It was necessary to ascertain (1) whether the scope of the said Treaty was such as to permit Spanish nationals to carry on trade in France without being in possession of the special identity card required from all traders of foreign nationality; (2) whether French nationals resident in Spain enjoy, in the latter country, freedom to carry on trade without a permit, on the basis of reciprocity. It was for the Court to address itself to the Minister for Foreign Affairs on these two specific points, before dealing with the merits of the prosecution. The Court of Appeal, in deciding the case on the merits without first obtaining the authoritative view of the competent authority on these preliminary questions, has acted *ultra vires*, and the judgment must accordingly be set aside."

[Report: *Clunet*, 80 (1953), p. 644.][1]

Treaties—Interpretation of—Agencies of Interpretation—Courts of Law—Reparations Agreement of January 14, 1946—Vesting of German Property in France—German Trade Marks—The Law of France.

ADMINISTRATION DES DOMAINES AND OTHERS *v.* ÉTABLISSEMENTS SIDNEY-MERLIN AND OTHERS.

France, Court of Appeal of Paris. March 21, 1953.

THE FACTS.—Before the Second World War a German firm was the registered owner of the internationally registered trade mark " Olympia " in respect of typewriters manufactured at a factory in Germany and offered for sale in France. By virtue of the Potsdam Agreement of 1945 and the subsequent Reparations Agreement of January 14, 1946, the signatories of these two Agreements, including France, were given the right to seize, by way of reparation due from Germany, all German property situate in their respective territories. The competent French authority, the first appellants herein, accordingly made a vesting order in respect of the trade mark " Olympia " and granted an exclusive licence thereof to the second appellants, a French firm of distributors of typewriters. The first respondents, another French firm of distributors of typewriters, imported typewriters from a German firm other than the owners of the trade mark " Olympia " and offered these typewriters for sale in France under the trade mark " Olympia ". The French authorities thereupon seized the typewriters imported by the first respondents, and the second appellants brought an action for infringement of the trade mark " Olympia " and damages for passing off. On behalf of the first respondents it was contended that as the factory of the original German owners of the trade mark concerned was situate in the

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[1] See also the judgments of the Cour de Cassation of the same date in *Re Bruni and Galtier*: *Dalloz*, 1953, *Jurisprudence*, p. 425, and *Clunet*, 80 (1953), p. 648; and *Procureur Général de Lyon* v. *Sanchez*: *Dalloz*, 1953, *Jurisprudence*, p. 365, and *Sirey*, 1953, *Jurisprudence*, Part I, p. 185. The Minister for Foreign Affairs subsequently (on June 18, 1953) stated that " no foreign national is at present entitled, by virtue of treaty law, to engage freely in the activities of trader, artisan or manufacturer, and that foreign nationals remain subject to the requirements laid down in French legislation ". *Cf. Clunet*, 81 (1954), p. 116.

Soviet Zone of Germany and had there been nationalized by the Soviet authorities, the action impleaded the Soviet Union and was therefore not maintainable, and that the firm's trade marks in France shared the fate of the firm's business in Germany and were no longer valid in France.

Held: (i) that the action did not implead the Soviet Union and was therefore maintainable in France; and (ii) that the first appellants were entitled to seize the first respondents' typewriters which infringed the trade mark " Olympia ", and that the second appellants were entitled to an injunction and damages.

The Court said: " On the question of jurisdiction it is contended that the Administration des Domaines is in reality opposed to the Russian State, and that questions of international law which the courts are not entitled to determine must be settled before the case can be considered on the merits. The Court is not called upon to determine an appeal which may possibly be lodged by Messrs. Sidney-Merlin against the Soviet Union. In any event, Article 10 of the Agreement of December 29, 1945, on Franco-Soviet Commercial Relations, which was promulgated by a decree dated June 12, 1946, provides that such disputes as may arise shall be within the jurisdiction of the French courts and shall be determined in accordance with French law. According to Article 26 of the Constitution of October 27, 1946, treaties duly ratified and promulgated have the force of law, and the courts are therefore entitled to apply them, provided that in so doing they comply with the official interpretation of the French Government in difficult cases affecting international public policy, or that they defer a decision where they are of opinion that there is no such interpretation or that such interpretation requires clarification. This is not the case here, and the plea to the jurisdiction by Messrs. Sidney-Merlin must accordingly be overruled.

" The German firm of ' Olympia Business Machines ' registered several trade marks for typewriters before the war, and more especially the trade marks ' Olympia ' and ' Olympia Extra '. The Administration des Domaines re-registered these marks on June 2, 1949, at the Registry of the Commercial Court, and granted an exclusive licence thereof to the Coocimec Company on June 24, 1949. According to the bailiff's statement, the Administration des Domaines caused 116 typewriters offered for sale by Messrs. Sidney-Merlin under the trade mark ' Olympia ' to be seized at Messrs. Sidney-Merlin's registered office. By virtue of the Potsdam Agreement of July/August 1945, the Signatory States other than the Soviet Union, and more especially France, have the right to satisfy claims to reparation out of German property situate in their respective territories, the Government of the Soviet Union having waived any claims to German property situate outside Germany. The Final

Act of the Reparations Agreement of January 14, 1946, provides in Article 6 that each of the Signatory Governments shall keep such German property as is situate in its own territory, and that each Government shall act in accordance with its own municipal law. In pursuance of a governmental decree of October 5, 1944, concerning the sequestration of enemy property and interests the President of the Tribunal civil de la Seine made an order on October 23, 1945, whereby all trade marks owned in any manner whatsoever by enemies were seized. Article 20 of the Law of March 21, 1947, provided for the liquidation of German property and interests by the Administration des Domaines.

"The trade mark 'Olympia' was, before the War, entitled to legal protection in France, and the French Olympia Company had in fact sold several tens of thousands of typewriters bearing this trade mark, in France. The German firm which granted to its French branch establishment an exclusive licence to market its typewriters used the trade mark in such a manner that it thereby retained a right or interest in France, within the meaning of the Law governing sequestration . . . The Administration des Domaines is therefore right in contending that, in connection with French legislation governing trade marks as well as the sequestration of enemy property, and in pursuance of the order of the President of the Tribunal civil de la Seine of October 23, 1945, these marks have been properly vested and a licence granted to the Coocimec Company. Accordingly, there is no need to enquire whether the Soviet authorities have seized only the factory of the German Company in Erfurt (in the Soviet Zone of Germany), or whether they have seized all the assets of that Company, including the trade marks. Whatever the position, the action of the Soviet authorities can be effective only so far as concerns the assets situate in the Eastern Zone of Germany. Moreover, the German firm preserved in the Western Zone assets which have not been seized, and it started the production of typewriters under the trade mark 'Olympia'. These typewriters are being imported in a proper manner by the licensees of the Administration des Domaines, to whom the licensing fees are being paid . . . The confiscation of the first respondents' typewriters is therefore valid, and judgment must be given for the second appellants."

[Report: *Revue critique de droit international privé*, 43 (1954), p. 123.]

II.—Principles and Rules of Interpretation

Treaties—Interpretation of—Principles and Rules of—Interpretation of Treaties Incidental to that Directly Submitted to Arbitrator—Contemporaneous Interpretation—Limits of Interpretation in accordance with Usual Meaning of Terms—Principle of Effectiveness—Belligerent Occupation—Appropriation of Enemy Property—Limits of—Booty—*Postliminium*—Recovery of Property Looted in Occupied Territory during Second World War.

GOLD LOOTED BY GERMANY FROM ROME IN 1943.

(United States of America, France, United Kingdom, Italy).

Professor G. Sauser-Hall (*Arbitrator*).

Arbitral Advice of February 20, 1953.

THE FACTS (as stated by the Arbitrator).—

"[I] PRELIMINARY STATEMENT

" 1. *Arbitration Agreement.*—An Agreement submitting to arbitration certain claims with respect to gold looted by the Germans from Rome in 1943 was signed on April 25th, 1951, by the Governments of the United States of America, of the French Republic and of the United Kingdom of Great Britain and Northern Ireland. Its text runs as follows:

' The Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America (hereinafter referred to as the three Governments),

' Whereas Part III of the Final Act of the Paris Conference on Reparation provides:

> ' " A.—All the monetary gold found in Germany by the Allied Forces and that referred to in paragraph G below (including gold coins, except those of numismatic or historical value, which shall be restored directly if identifiable) shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany.
>
> ' " B.—Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold.
>
> ' " C.—A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after 12th March, 1938, was wrongfully removed into German territory.
>
> ' " D.—The question of the eventual participation of countries not represented at the Conference (other than Germany but including

Austria and Italy) in the above-mentioned distribution shall be reserved, and the equivalent of the total shares which these countries would receive, if they were eventually admitted to participate, shall be set aside to be disposed of at a later date in such manner as may be decided by the Allied Governments concerned.

'"E.—The various countries participating in the pool shall supply to the Governments of the United States of America, France and the United Kingdom, as the occupying Powers concerned, detailed and verifiable data regarding the gold losses suffered through looting by, or removal to, Germany.

'"F.—The Governments of the United States of America, France and the United Kingdom shall take appropriate steps within the Zones of Germany occupied by them respectively to implement distribution in accordance with the foregoing provisions.

'"G.—Any monetary gold which may be recovered from a third country to which it was transferred from Germany shall be distributed in accordance with this arrangement for the restitution of monetary gold."'

'Whereas for the purpose of fulfilling their duties under the aforesaid Part III, the three Governments established a Commission designated as the Tripartite Commission for the Restitution of Monetary Gold and invited all Governments which desired to make claims under Part III of the Final Act of the Paris Conference on Reparation for a proportionate share of the gold pool to submit their claims to the said Commission;

'Whereas in 1943 Germany looted, or wrongfully removed from Rome to German territory, 2,338.7565 kilograms of gold;

'Whereas Albania claims that the said amount of gold was monetary gold belonging to Albania within the meaning of the aforesaid paragraph C and that in consequence, under the aforesaid paragraph A, Albania should receive a proportionate part of the gold pool referred to in that paragraph;

'Whereas Italy claims that the aforesaid amount of gold was monetary gold belonging to Italy within the meaning of the aforesaid paragraph C and that in consequence, under paragraph A, Italy should receive a proportionate amount of the gold pool referred to in that paragraph;

'Whereas the Governments of Italy and Albania submitted claims to the Commission as above recited;

'Whereas the said Commission considered that the competitive claims of Albania and of Italy involved disputed questions which the Commission felt itself incompetent to determine and accordingly revoked its previous provisional decision on the matter (which previous decision shall now be regarded as a nullity) and referred the said claims to the three Governments for decision; and

'Whereas the three Governments considered that the aforesaid claims of Albania and Italy involve disputed questions of law and fact and, in order that they may, in the exercise of their duty under Part III of the Paris Act, carry out the distribution provided for in that Part correctly, they should be assisted by the opinion of an impartial and highly qualified jurist;

'Have agreed as follows:

'(1) The three Governments request the President of the International

Court of Justice to designate as an arbitrator an eminent and impartial jurist, to advise them as to the decision which they should adopt with regard to the aforementioned claims of Albania and of Italy. The emoluments and expenses of the arbitrator shall be defrayed by the Tripartite Gold Commission as a proper charge against the gold pool.

'(2) The arbitrator, after taking into account all the facts and all the legal considerations which it is proper for the three Governments to take into account under Part III and bearing in mind that his advice should be consistent with decisions already made in other cases by the Tripartite Gold Commission, is requested to advise the three Governments whether,

(i) Albania has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to Albania, or

(ii) Italy has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to Italy, or

(iii) neither Albania nor Italy has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to either of them.

'The arbitrator is requested to furnish his advice in the form of a fully reasoned opinion.

"(3) Before submitting his opinion, the arbitrator shall afford to the Governments of Albania and of Italy and to each of the three Governments an opportunity of submitting to him any material, evidence and arguments relating to the questions submitted to the arbitrator which they may respectively desire to submit.

'(4) Save as provided in the two proceeding Articles, the arbitrator shall determine all questions of procedure, including the manner and the time limits within which evidence and observations may be submitted to him by any Government entitled to do so. Before determining any questions of procedure, he shall convoke a meeting at Brussels of the Agents of all the Governments entitled to submit evidence and arguments to him and shall hear their views with regard to all questions of procedure. If any Government entitled to do so does not, within thirty days of being invited to do so by the arbitrator, inform the arbitrator of its intention to appoint an Agent and to submit evidence or observations, that Government shall be deemed to have renounced its right to do so.

'(5) The three Governments, in exercising their duty under Part III of the Final Act of the Paris conference on Reparation, will accept the advice given by the arbitrator on the question whether Albania, or Italy, or neither has established a claim to the aforesaid amount of gold.'

"2. *Designation of the Arbitrator.*—In pursuance of Article 1 of the Agreement quoted above (hereinafter called the *Washington Agreement*), the Secretary of State of the United States, on behalf of the three signatory Governments and referring also to a *Statement* attached to the Agreement, the contents of which will be examined later in the present arbitral advice, requested the President of the International Court of Justice to designate an arbitrator entrusted with the task of giving an advice on the claims of Albania and Italy in respect of the distribution of a certain quantity of monetary gold wrongfully removed from Rome to Germany in 1943.

" Accordingly, the President of the International Court designated the undersigned jurist, Mr. George Sauser-Hall, of Swiss nationality, Member of the Permanent Court of Arbitration, after having obtained his acceptance, as arbitrator entrusted with the task defined in the Washington Agreement.

" 3. *Procedure.*—In accordance with paragraph 4 of the Washington Agreement, the undersigned Arbitrator convoked to Brussels, on November 5th, 1951, at the seat of the Tripartite Commission for the Restitution of Monetary Gold (hereafter called the *Tripartite Commission*), the Agents of all the Governments entitled to submit to him material, evidence and oral arguments, including the Agents of the Governments of Albania and of Italy, entitled to do so under Article 3 of the aforesaid Agreement. The Government of Albania alone failed to appoint an Agent.

" After the hearing of the Agents of the United States of America, of France, of the United Kingdom of Great Britain and Northern Ireland, and of Italy, the Arbitrator made, on the same day, *Decisions upon questions of Procedure*, in French and English, which were sent by post to the High Contracting Parties on November 10th and 15th, 1951. It is stated (in Article 2, paragraph 2) of these Decisions that the Arbitral Advice will be drafted in French and English, the French text being authoritative.

" The Arbitrator transmitted this document to the Minister of Foreign Affairs of the People's Republic of Albania in Tirana, by express and registered post on November 10th, 1951, and referred to paragraph 4 *in fine*, of the Washington Agreement, which runs: ' If any Government entitled to do so does not, within thirty days of being invited to do so by the arbitrator, inform the arbitrator of its intention to appoint an Agent and to submit evidence or observations, that Government shall be deemed to have renounced its right to do so.' Accordingly, he fixed a time-limit of thirty days, from the reception of his letter dated November 10th, 1951, inviting the Minister to declare his intentions on the subject. Having failed to answer this request, the Government of Albania is deemed to have renounced its right to participate in the procedure; all the other Parties concerned were duly informed of the fact by letters dated January 26th, 1952.

" [II.] THE FACTS PROPER

" The subject of the dispute is the allocation to Albania or to Italy, or to neither of them, of a certain quantity of monetary gold looted by the Germans from Rome on September 16th, 1943.

" The dispute arose from the following facts, the exactitude of which is on the whole not contested by France, Italy and the United Kingdom, as was shown in the oral proceedings, with the exception of a few points later to be examined in the present advice, in accordance with the arbitrator's competence to take into account all the facts and all the legal considerations which it is proper for the three Governments signatory to the Washington Agreement to take into account under Part III of the Paris Act (paragraph 2 of the Washington Agreement).

" These facts may be said to fall into four stages: first, the creation of the National Bank of Albania (to be described in this advice as *the Bank*); second, the invasion of Albania and its monetary consequences; third, the looting and wrongful removal of the gold to Germany; fourth, the allocation of the gold and the origin of the dispute.

" *A*.—After the First World War, the Financial Committee of the League of Nations asked Professor Albert Calmès, of Luxembourg, to present a report on what measures should be taken to bring about a complete reform of the finances of the Albanian State, rendered inevitable by the circumstances.

" His report, submitted to the League of Nations in September 1922, urged the immediate creation of a bank in Albania ' directed by foreigners and protected by a special charter providing against any possibility of direct or indirect seizure by the State of private capital invested or deposited there.' The State might confer upon the Bank the privilege of issuing bank-notes but, the rapporteur added, ' it is essential that the Bank should remain entirely a private venture, with no possibility of interference on the part of the State in its affairs. Apart from the Note Issue Department, the State would have no share in the matter.' The rapporteur emphasized that ' needless to say, the Bank of Issue must not on any account degenerate into a paper money factory . . . To this end, the notes should be covered partly by gold (30 per cent. to 40 per cent. of the issue) and for the rest by short-term credits.'

" In the exercise of its sovereignty, the Albanian Government deemed it possible to accept the advice proffered by the Financial Committee of the League of Nations upon the basis of this report, and entered into negotiations with an Italian Group led by Mr. Mario Alberti, a representative of the Italian Government on the aforesaid Committee; high financial circles in London and Paris did not think it advisable to take part in the constitution of the capital of the future Bank.

" Informed of Mr. Alberti's intentions, the Financial Committee, through its President, Mr. Albert Janssen, wrote him a letter of March 27th, 1924, that it had

' expressed its opinion on the principles on which it believes that the Bank of Issue could be founded in Albania. It trusts this opinion may assist the Government with regard to the measures to be taken and in the negotiations for the subscription of capital. But the responsibility and the powers of the Committee go no further . . . Under these circumstances it does not pertain to the Committee to hinder other arrangements, such as those suggested in your letter, providing they be applicable and in accordance with the wishes of the Albanian Government.'

" It is not possible to find that the League of Nations gave [a] mandate to Italy to establish the Bank, as is asserted in the first Italian Memorial; its approval was of a purely moral character and may perhaps be related to the Protocol adopted on November 9th, 1921, by the Paris Conference of Ambassadors, recognising the importance of Italian interests in Albania. But the part of the League of Nations was limited to making recommendations and giving technical indications; the League did not conduct the negotiations which led to the establishment of the Bank nor did it decide its structure or functions.

" The Italian financial Group, made [up] of Italian banks, companies and private subscribers, received the support and collaboration of the Société Générale de Belgique, of the Banque Commerciale de Bâle, of a ' consortium ' of Yugoslav banks and of some Albanian citizens. On March 15th, 1925, the Group concluded in Tirana with the Albanian Government a *Banking Convention*, which was approved by the Albanian Chamber of Deputies on June 23rd, 1925, and by the Albanian Senate on July 5th, 1925, at the same time as the *Law of the National Bank of Albania*, hereinafter called the *Organic Law*, and as the *Law on the Monetary System*. These three acts were promulgated as laws of the Albanian State on the same date, in pursuance of a Presidential Decree of July 12th, 1925; they were published in the Albanian ' Official Gazette ', No. 36 and 40, on July 12th and 31st, 1925, in Italian and Albanian, the former text being authoritative in case of doubt for the interpretation of the Banking Convention.

" In accordance with clause 1 of the Convention, the Italian Group constituted the National Bank of Albania on September 2nd, 1925, in Rome, as a joint stock company, in the course of a first general meeting, an Italian notary public being present throughout the proceedings; minutes of the meeting were made in solemn form and duly registered in Rome, on September 10th, 1925, under No. 4386 of Volume 442 of the Public Acts. The meeting approved the Statute of the Bank, which was homologated by the Finance Minister and filed in the Ministry of Finance of Albania; the Statute almost wholly reproduces the provisions of the Albanian Organic Law, with a few inevitable changes of form and adaptation.

" The legal position created by the Statute is not quite accurately described in the first Italian Memorial which, failing to take all relevant texts into account, seems to place in Rome the centre of the new Bank, whereas this centre was in Tirana, as provided by the fundamental acts on which the Statute is based, namely the Banking Convention and the Organic Law. Under clause 3 of the Banking Convention, ' The central direction of the Bank shall have its headquarters in the capital of Albania ', a provision confirmed by Article 2 of the Organic Law: ' The central direction of the Bank is in the capital of Albania.' However, the same Article goes on to say: ' the seat of the Council and of the Board of Management may be abroad '. Pursuant to this provision, the seat of the Council and of the Board of Management was fixed in Rome by the Statute; hence the necessity to hold in this city the ordinary and special assemblies of shareholders, in accordance with Article 28 of the Organic Law and Article 28 of the Statute.

" It cannot be doubted that the legal status of the Bank is determined by Albanian law as a general principle, a fact which is clearly established by the texts, namely: in the Banking Convention, clause 5: ' the Bank will be established in accordance with the law of the State '; clause 8 *in fine*: ' the Bank places itself unreservedly under the laws of the country '; clause 12: ' the Government will provide for the enactment of all requisite laws to ensure the regular working of the Bank and to provide a scientific monetary system, as also laws for regulating bills of exchange, bonds, debentures, mortgages, etc. '. Lastly, Article 1, paragraph 2, of the Organic Law, provides that ' its activities are regulated by the present law and by the Statute of the Bank drafted in accordance with the said law '.

" It is true that clause 15 of the Banking Convention provides that ' as far as possible the Bank will be administered in conformity with the practice and habits of Italian banks ' and that ' the annual assemblies . . . will be held in accordance with the provisions of Italian law regulating joint stock companies '.

" This application of Italian law, however, was only subsidiary and complementary when, owing to the somewhat rudimentary nature of Albanian legislation, it became necessary to resort to a more developed legal system. This is clearly established by Article 1, paragraph 3, of the Organic Law and by Article 1, paragraph 3, of the Statute, according to which the principles of Italian legislation applicable to commercial companies will hold good by analogy in cases for which the law and the Statute make no provision.

" Another important exception to Albanian sovereignty results from the position attributed to the Bank of Issue. Under clause 6, litt. *b*, *c*, and *d* of the Banking Convention, the new Bank was to have the exclusive privilege of issuing paper money which would be sole legal tender for payments in Albania, of minting and issuing all metalic currency, the profits thereon being divided in equal parts between the Bank and the Albanian State, and finally of receiving Government funds on deposit and discharging the service of the Treasury. All these provisions were put into effect by Articles 21, 15, paragraphs 1 and 2, sections (4), (7) and (12) of the Organic Law and of the Statute. Notwithstanding the fundamental rôle assigned to the Bank in the consolidation of the finances of the Albanian State, the metallic reserve which it had to form under clause 11 of the Banking Convention was not deposited in Albania.

" Having regard to the insecurity still prevailing in Albania, where disturbances were taking place at the time of the creation of the Bank, the Board of Management decided that the metallic reserve of the Bank would be deposited in Rome with the Royal Mint (in point of fact, a small part of this reserve was held on deposit with the Bank of Italy in Rome). It remained there and was never transferred, even temporarily, to Albania, except for a small quantity of gold which was held at the Tirana and Durazzo branches of the Bank and falls outside the scope of the present arbitration.

" It is undisputed that this metallic reserve was carried at all material times on the books of the National Bank of Albania; this is expressly admitted by the Italian Memorandum on the subject of the Bank's gold, dated December 11th, 1948, and by the First Italian Memorial; the fact is also proved by the balance sheets of the Bank compiled on December 31st, 1933 and on December 31st, 1942, the only sheets reproduced in the pleadings.

" The present Artibrator finds that it is established beyond doubt, by the copy of original documents relating to gold purchases made by the Rome office of the National Bank of Albania (First Italian Memorial, Annexes No. 9) that the gold reserve which was, under clause 11 of the Banking Convention and Article 22, paragraph 2, of the Organic Law and of the Statute, to cover the Albanian note issue, was in fact acquired in the manner described in the First Italian Memorial (pages 11 and 12); this fact is undisputed by the Governments concerned. Suffice it then to recall that this metallic reserve was not made of gold exported from Albania, nor was it purchased with currencies drained from Albania and transferred abroad; this would be most improbable moreover, as is shown by the constant deficit in the Albanian balance of trade from 1922 to 1938. The gold necessary for the issues of the Bank was purchased on the international free market (London, Paris, New York) through firms specialised in such trade and with currencies supplied by Italy.

" The Bank's metallic reserve, made of gold for the most part, with occasionally small holdings of silver, was gradually increased so that on December 31st, 1942 (last balance sheet compiled before the events of September 1943) it amounted to 7,567,177.46 gold francs. When the gold held in Albania is deducted from this figure, the gold held on deposit in Rome represented, according to the information given in the First Italian Memorial, 7,345,349.46 gold francs. Further, the Bank had another deposit also with the Royal Italian Mint in Rome. The final amount agreed upon by the Tripartite Commission, in its letter of January 23rd, 1948 to the Delegate of Albania, correcting some of the indications given by the latter in his Reply to the Questionnaire on gold, is 2,338.7565 kilograms of gold; the three Governments parties to the Washington Agreement have likewise agreed that this figure represents the quantity of monetary gold deposited in Rome in September 1943; this figure is the same, but for an inconsiderable difference of 0.5 milligrams of gold, as that mentioned in the Protocol established in Berlin on April 6th, 1944, and signed by Mrs. Lorenzo Musani and Sandro Bressan, both directors of the Albanian National Bank, and others, at the time of the verification of the cases containing the looted gold.

" In the constitution of the capital of the company, the Italian Group secured a privileged position. Under the provisions of the Banking Convention (clauses 1 and 3), of the Organic Law and of the Statute (Article 4), the nominal capital was fixed at 12,500,000 gold francs divided into 495,000 ordinary shares each, of the value of 25 gold francs and in 100,000 founders' shares, each of the value of 1.25 gold francs. Albanian nationals could not obtain the majority, and had the right to participate in the subscription of the capital up to the limit of 49 per cent. only of the share capital. 45 per cent. of the shares (as well as the 100,000 founders' shares) were subscribed by the Italian Group; 30 per cent. by Albanian nationals and the remaining 25 per cent. by foreign banks (Swiss, Belgian and Yugoslav) ; further, all the founders' shares (100,000) were reserved to the Credito Italiano, whose seat was in Genoa.

" From 1925 to 1935, the Italian Group bought almost all the shares owned by Albanian citizens, so that the latter's participation was reduced to 2 per cent. only at the end of 1935, according to information supplied in the First Italian Memorial and undisputed in the present proceedings.

" Subsequently, the shares owned by private shareholders or by companies which were members of the Italian Group changed hands as a result of the Italian Royal Decree No. 1614, dated August 28th, 1935, providing for the ' compulsory transfer of foreign credits and conversion into 5 per cent. Treasury Bonds of all foreign stocks, or Italian stocks issued abroad, owned by Italian citizens and corporations '. In pursuance of Articles 1 and 2 of the said Royal Decree, the shares of the National Bank of Albania, owned by Italian citizens residing in Italy or by firms, partnerships or corporations of every kind, of Italian nationality and residing in Italy, were surrendered and transferred to the National Institute for Foreign Exchanges, on behalf of the Italian State Treasury. Finally, from 1935 to 1941, the Italian State bought from foreign banks a further number of shares of the National Bank of Albania representing 15 per cent. of the capital.

" By these transactions, the Italian State acquired the majority of the shares; its participation represented on September 16th, 1943, 88.5 per cent. of the total of ordinary and founders' shares, the remaining being owned by a Yugoslav bank (10 per cent.) and by Albanian private subscribers (1.5 per cent.). Since then, there has been no change in this distribution of the shares (Affidavit of

Notary Giovanni Grassi, dated January 9th, 1952, First Italian Memorial, Annex No. 8).

" *B*.—On April 7th, 1939, Albania was occupied by the Italian armed forces. This did not lead to the annexation of Albania by Italy, but to the substitution of the old Government by a new one under the control of Italy.

" The two States remained separate and concluded in Tirana, on April 20th, 1939, an Economic, Monetary and Customs Convention which provides, in its article 15, that ' the monetary provisions of the Albanian Law of July 12th, 1925, and those of the law of the same date on the National Bank of Albania shall be and are abrogated and modified insofar as they conflict with or are different from the provisions of this Convention '. The provisions of the Convention which had such repealing effect are set out in Articles 10–13, reproduced in the Statute of the Bank as amended by the Assembly of shareholders held on June 10th, 1939.

" The most important of these provisions is Article 11, which modified the cover for the Albanian note issue; it reads:

> ' The cover of the circulation of the National Bank of Albania shall be composed of Italian lire and banknotes, or other credits on the Bank of Italy. Therefore the Albanian franc shall have the same gold cover as the Italian lira.'

" Moreover, under Article 10, the Albanian franc became a currency tied to the Italian lira, at a fixed parity of 6.25 Italian lire to one Albanian franc; Article 13 provides for convertibility at sight into Italian lire at the rate prescribed.

" No reference is made in the Convention to the Bank's metallic reserve; it is only provided that the Albanian franc shall have the same gold cover as the Italian lira. The Italian Government intended the gold reserve of the National Bank of Albania to be carried on the books of the Bank of Italy; but this attempt failed, as it was not possible to reach an agreement with the Bank's directors on the rate of exchange gold-lira. Consequently, although the Bank's gold reserve remained for the most part deposited with the Royal Mint in Rome, it never ceased to appear in the books among the assets of the Bank, and it never was part of the cover for the Italian note issue.

" Further, under Article 31 of the Peace Treaty of February 10th, 1947, between the Allied and Associated Powers on the one hand, and Italy on the other, all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7th, 1939, to September 3rd, 1943, are null and void.

" *C*.—The facts relating to the removal of the gold reserves of the National Bank of Albania by the German forces are not contested by the Parties concerned.

" It has been proved that, on September 16th, 1943, after the signature of the Armistice between Italy and the Allied and Associated Powers, the Germans seized 2,338.7565 kilograms of gold, which had been for the most part deposited in the form of ingots with the Italian Mint and at the offices of the Bank of Italy in Rome; gold coins which had been deposited in part at the offices of that Bank and in part at the Rome office of the National Bank of Albania, were also seized. The seizure was made, upon instructions of the German Embassy in Rome, by a patrol of German 'S.S.' led by Major Herbert Kappler, who was assisted by Mr. Joseph Ortmann, Chancellor at the German Embassy. They gave receipt, in due form, for the gold thus wrongfully removed.

"The gold was carried away on a motor-truck, conveyed to Germany and deposited at the Reichsbank in the name of the German Ministry of Foreign Affairs; it was eventually recovered by the Allied forces after the capitulation of Germany.

"On April 6th, 1944, a 'Confidential Protocol' was concluded between the German Government and the Albanian Government in respect of the gold looted from Rome and deposited at the Reichsbank. It was agreed that the gold should remain deposited at the said Bank, in a closed depot, but in the name of the Central Direction of the National Bank of Albania, and that the right of disposing of this gold should henceforth belong solely to the Central Direction of Tirana, upon written authorization of the Albanian Government. This Confidential Protocol refers in express terms to a Protocol of the same day, April 6th, 1944, established by representatives of the National Bank of Albania, of the Reichsbank and of the German Ministry of Foreign Affairs, in which a list of the looted gold is elaborated and in which it is stated that this gold has been identified, put into numbered cases which were closed, encircled with a band of steel and finally sealed with the leaden seal of the National Bank of Albania.

"On January 13, 1945, the Albanian anti-fascist National Council of Liberation, constituted after the country had been evacuated by the German forces, promulgated a law cancelling the Convention of March 15th, 1925, between the Albanian Government and the Italian Financial Group, as well as all the shares of the National Bank of Albania, whose assets and liabilities were transferred to the Albanian State. On the same date, Albania adopted the Organic Law on the State Bank of Albania and assigned to it all the assets and liabilities of the so-called 'ex-National Bank of Albania' (Article 3).

"These measures did not conduce to the liquidation of the Rome office of the latter Bank.

"*D.*—After the end of the hostilities, the Governments of eighteen States, including the United States, France, the United Kingdom and Albania, signed, on January 14th, 1946, an Agreement on Reparations from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, which is here called the *Act of Paris*. It is provided in this Agreement that all the monetary gold found in Germany by the Allied Forces and that which may be recovered from a third country to which it was transferred from Germany, shall be pooled for distribution as restitution among the countries participating in the pool, in proportion to their respective losses of gold through looting by or by wrongful removal to Germany.

" On December 16th, 1947, the Governments of the United States, France, the United Kingdom and Italy signed a Protocol, hereinafter called the *Italian Protocol*, which was deemed to have entered into force on the same day as the Treaty of Peace, that is to say on September 15th, 1947. By this Protocol, it was agreed that Italy should receive a proportional share of the gold to be distributed in pursuance of Part III of the Act of Paris, on the same basis as the other signatories.

" By Part III of the Act of Paris, the Governments of the United States, France and the United Kingdom were required to take appropriate steps to implement the distribution of monetary gold in accordance with the provisions of the said Act. To this end, they established the Tripartite Commission for the Restitution of Monetary Gold on September 27th, 1946; its decisions were required to be unanimous.

" On March 13th, 1947, the said Tripartite Commission circulated to the eighteen signatories of the Act of Paris and to three countries not represented in the Paris Conference, including Italy, its terms of reference and a ' Questionnaire on gold ' containing several forms to be filled in by the claimant Governments in order to furnish the Commission with complete and circumstantial information on each individual loss of monetary gold suffered through looting by or wrongful removal to Germany.

" On September 15th, 1947, the Government of the People's Republic of Albania presented, together with its reply to the Questionnaire on gold, a claim for the restitution of the monetary gold which, in its opinion, it had been deprived of by the removal of the Bank's gold reserve.

" The Tripartite Commission was somewhat reluctant to comply with this request, as is shown by the written and oral proceedings in the present arbitration. Taking into account however the only data then in its possession, which were contained in the Albanian request, it decided twice to make a preliminary distribution of gold to Albania up to an amount of 1,121.4517 kilograms of gold, according to its letters of February 16th and June 30th, 1948. However, the gold was in fact never delivered to the Albanian Government, for the following reasons: 1° the Albanian Government expressed its intention to add a reserve based upon article 75, paragraph 8, of the Italian Peace Treaty, to the text of the receipts and waiver relating to the looted gold it had been asked to sign by the Tripartite

Commission upon delivery; the Commission was unable to accept such reserve; 2° communications with his Government being slow, the Albanian Delegate was unable, before June 16th, 1949, to indicate where the gold should be delivered to his Government; lastly, 3° during the delay, the Italian Government objected to the delivery to Albania of the Bank's gold reserve.

"Italian objections were first expressed in a rather moderate form, by letter dated May 21st, 1947, for the obvious reason that the Peace Treaty of February 10th, 1947 had not entered yet into force and that the Italian participation in the pool of monetary gold to be distributed under Part III of the Act of Paris was still uncertain. The Italian Government 'mindful of present day political realities, while prepared in this instance not to insist on Italy's right of property in the gold in question', nevertheless expressed the hope that the Tripartite Commission would carry out new investigations regarding the origin of the Bank's gold reserve and would decide that this gold be blocked pending an agreement in the matter between the Governments concerned. As the Albanian claim for restitution of the Bank's gold reserve had not been submitted then (it was submitted later, on September 15th, 1947), the Tripartite Commission did not inform forthwith the Albanian Government of this first Italian intervention.

"Two notes had previously been sent by Italy, on November 14th, 1946 and on April 30th, 1947; they were not included in the documents submitted in the present arbitration and were not found in the archives of the Tripartite Commission. After the abovementioned note of May 21st, 1947, a Memorandum of December 11th, 1948, was delivered by the diplomatic envoys of Italy to the Governments of Washington, Paris and London, Italy having meanwhile been admitted, under the Italian Protocol of December 16th, 1947, to the pool established by the Act of Paris, Part III. Brought to the knowledge of the Tripartite Commission by letter of March 18th, 1949, this document was not found to contain sufficient reasons to warrant a revision of its previous decisions; the Italian Government was informed by letter of the said Commission dated May 20th, 1949.

"In reply to this letter, the Italian Government notified the Tripartite Commission of its formal opposition to the allocation to Albania of the Bank's gold seized in 1943 and requested the said Commission, in a letter of June 22nd, 1949, accompanied with a lengthy note, to reconsider its decisions made on February 16th and June 30th, 1948, in favour of Albania.

"In view of this request, which explained in a much more explicit manner than earlier notes the reasons relied upon by the Italian Government, the Tripartite Commission decided to suspend the delivery of the gold in question until a detailed and thorough examination of the problems raised by the Italian claim could be made. Informed of this decision, by letter of July 11th, 1949, Albania protested several times, by letters dated July 26th, October 21st, and December 1st, 1949, and urged the Commission to deliver the gold.

" Having requested, by letter of July 22nd, 1949, and obtained from Italy, on January 15th, 1950, detailed information—to which was added supplementary information contained in a letter of July 25th, 1950, from H.E. the Ambassador Sola, Special Envoy of the Italian Government to the Tripartite Commission—the Commission took, on November 17th, 1950, the following fundamental decision, which led to the present arbitration proceedings:

'The Commission finds itself seized of a case where the Albanian Government has claimed restitution of gold of the National Bank of Albania directly from Italy under the provisions of the Italian Peace Treaty on the grounds that it was wrongfully removed by Italy from Albanian possession, while both Albania and Italy have claimed restitution of this same gold from the Commission on the grounds that it was wrongfully removed by the Germans from Rome. The Commission is satisfied that 2,338.7565 kgs. of gold were looted by Germany from Rome, but the claim by Albania against Italy is beyond the competence of the Commission and it is the view of the Commission that a decision on this point is an essential preliminary to their consideration of the two claims which are before them, one by Italy and one by Albania, of wrongful removal by Germany from Rome.

' For these reasons, the Commission is unanimously agreed to cancel its previous awards and to refer that part of the claim which concerns the 2,338.7565 kgs. taken from Rome to its three Governments. If the three Governments constituting the Commission should so approve, and should no decision be reached by the three Governments which would enable the Commission to make any specific award before the Commission announces its final awards on all the claims submitted to it, the Commission would propose to place in reserve those proportions of the gold pool corresponding to the gold reserves of the National Bank of Albania, both at Rome and at Tirana, for ultimate disposal in the light of developments.'

" This decision was communicated to the Albanian Government and to the Italian Government by two letters of the same day, December 5th, 1950, of the Tripartite Commission; in its Memorials, the latter Government describes it as a decision taken on December 5th, 1950; in fact, it was taken on November 17th, 1950, and will be quoted as such in the present arbitral advice. In its correspondence with these two Governments, the said Commission emphasized on the one hand, that the revocation of its previous allocations of gold to Albania according to its letters of February 16th and June 30th, 1948, did not imply a rejection of the claim submitted by the Albanian Government in respect of the Bank's gold, and, on the other hand, that its decision to refer this claim to the three Governments, for the sole purpose of determining which claim for restitution of the gold lost by the Bank should be recognized, did not imply a rejection of the Italian intervention; both claims remain, and all the data relating to them will be, as they indeed were, communicated to the three Governments constituting the Commission.

" After the reception of this letter, the Albanian Government renewed its earlier protests and explained its position in three letters dated February 26th, May 3rd and July 21st, 1951. It contended that the Tripartite Commission, having previously recognized its claims to the gold of the National Bank of Albania looted from Rome, could not reconsider its decisions, nor refer the mission entrusted to it to the three Governments constituting the said Commission; the same Government signified to the Commission a defence to deliver to any third party the amounts of fine gold previously allocated to Albania.

" In a reply of June 27th, 1951, the Tripartite Commission, while questioning the validity of these contentions but without entering into a discussion of them, informed the Albanian Government of the conclusion of the Washington Agreement of April 25th, 1951, and pointed out that Albania had an opportunity to submit all its arguments to the arbitrator who was to be designated pursuant to this Agreement.

" As is stated above in the part of the present advice concerning procedure, the People's Republic of Albania, although invited by the undersigned arbitrator, by registered letter of November 10th, 1951, to participate in the arbitration proceedings, under article 4 of the Washington Agreement, failed to do so and was consequently deemed to have renounced its right to submit evidence or observations to the Arbitrator."

Held: that it was established that 2,338.7565 kilograms of monetary gold, looted by Germany from Rome in 1943, belonged to Albania, within the meaning of Part III of the Act of Paris of January 14, 1946.

The Arbitrator said:

" [*The Arbitrator's Terms of Reference*]

" [(i) *Competence as determined by the Arbitration Agreement.*] It is essential to determine with precision the nature and the extent of the task with which the Governments signatory to the Washington Agreement have agreed to entrust the undersigned arbitrator. The Parties concerned are in disagreement on this subject.

" In the course of the proceedings and particularly in the oral part of the proceedings, the Agents of the Italian Government insisted on the fact that the arbitrator's powers are unlimited, inasmuch as the Governments signatory to the said Agreement had, in their opinion, given him all the authority they themselves possessed, under the Act of Paris, to implement, in the words of the Preamble to this Act, the equitable restitution of monetary gold, including that gold wrongfully removed from the Bank by the German forces, in Rome in 1943. They took the view that the arbitrator was competent to deal with all questions which the Tripartite Commission itself regarded as preliminary, when acting in pursuance of Part III of the Act of Paris, in the terms used in its decision of November 17th, 1950, and in its two letters of December 5th, 1950, sent the one to Albania and the other to Italy, namely: *a*) questions relating to the carrying out of Article 75, paragraph 8, of the Italian Peace Treaty of February 10th, 1947, and *b*) questions relating to the problem of the ownership of the Bank's gold.

"The Agent of the United Kingdom criticized this argumentation, which would result in the questions actually put to the Arbitrator in the Washington Agreement being [replaced by] the questions formulated by the Tripartite Commission. He pointed out that the two letters written by the Commission on December 5th, 1950, merely communicate to Albania and Italy the text of an earlier decision of the said Commission, taken on November 17th, 1950, in which mention is made of Article 75, paragraph 8, of the Peace Treaty, but not of the question of ownership, in order to explain why the Tripartite Commission was referring the Albanian and the Italian claims to the three Governments establishing the Commission. He explained further that the said Governments never intended to restrict themselves to the issues the said Commission regarded as doubtful and that they never admitted these questions to be preliminary to a decision upon the allocation of looted gold to one or the other of the claimants; on the contrary, they considered these questions as subsequent, to be settled if necessary by a separate process, by the International Court of Justice, under a Statement agreed upon on the same date as the Washington Agreement and which is to be examined below.

"There can be no doubt, in the Arbitrator's opinion, that he derives all his powers from the Washington Agreement and is only competent to examine the three questions put to him in Article 2, paragraphs (i), (ii) and (iii) of this Agreement.

"However, before defining the exact scope of the Arbitrator's competence, it must be remembered that the three Governments, under the penultimate paragraph of the Preamble to the Washington Agreement, intended to seek the assistance of a qualified jurist to determine disputed questions of law and of fact involved by the competitive claims of Albania and of Italy with respect to the gold wrongfully removed in 1943 from Rome to Germany, in order that they may, in the exercise of their duty under Part III of the Paris Act, carry out the distribution provided for in that Part correctly.

"It follows that the arbitrator is substituted for the three Governments to examine whether it has been established that the looted gold belonged (i) to Albania, or (ii) to Italy, or (iii) that neither Albania nor Italy has established that it belonged to either of them; in so doing, the arbitrator is bound to take into account all the facts and all the legal considerations 'which it is proper for the three Governments to take into account under Part III of the Act of Paris'. The Washington Agreement (paragraph 1) prescribes in express terms to the arbitrator to advise the three Governments 'as to the decision which they should adopt with regard to the claims . . . of Albania and of Italy'; under paragraph 5 of the aforesaid Agreement, the three Governments 'in exercising their duty under Part III of the Final Act of the Paris Conference on Reparation, will accept the advice given by the arbitrator' on the questions put to him.

"The dispute submitted to the Arbitrator has the following distinctive feature: it arose from a conflict of interests between Albania and Italy as regards the distribution of the Bank's gold looted from Rome by the Germans in 1943. Feeling itself incompetent to adjudicate upon the competitive claims of the two States, the Tripartite Commission referred them for decision to the three Governments, empowered under Part III of the Act of Paris, to take all necessary steps to implement the distribution of monetary gold by way of restitution in accordance with the provisions of the said Act. The three Governments are unable to agree on a point of law and interpret differently paragraph C of Part III of the Act of Paris. The conflict between the legal views of the three mandatory Governments is now submitted to the Arbitrator; his advice will be final; the three Governments will have to accept it when taking their decision, which will have legal force, as between the States concerned, as intended in the Act of Paris.

"The People's Republic of Albania, in signing the Act of Paris, accepted the powers thus given to the three Governments, with all the consequences thereof. The Italian Republic, not signatory to the Act of Paris, adhered to it and accepted in the Italian Protocol of December 16th, 1947, all the arrangements which have been or will be made upon that basis. Paragraphs 2 (*in initio*) and 3 of the said Protocol provide that:

'2. Italy adheres to the arrangement for the restitution of monetary gold set forth in Part III of the abovementioned Agreement (Act of Paris of January 14th, 1946) . . .

'3. Italy accepts the arrangements which have been or will be made by the Allied Governments concerned for the implementation of the aforesaid arrangement.'

"The Washington Agreement is, therefore, one of the arrangements for the implementation of the Act of Paris which the three signatory Governments are empowered to make in pursuance of the said Act. As the latter was a multilateral treaty, the three Governments, in accordance with one of the most established principles in the Law of Nations, reserved in paragraph 3 of the Washington Agreement to the Governments of Albania and Italy, whose interests are more directly concerned, the right to intervene in the present arbitral proceedings and the opportunity of submitting to the arbitrator any material, evidence and arguments relating to the questions submitted to the Arbitrator which they may respectively desire to submit.

" The Italian Government took part, without any reservation, in the present arbitral proceedings, thus recognizing that they remain within the limits fixed in the Act of Paris. The Albanian Government, although regularly invited by the Arbitrator to inform him of its intention to appoint an Agent and to submit evidence or observations, failed to do so; this voluntary abstention, however, has no other consequences than those mentioned in paragraph 4 of the Washington Agreement, namely, that Albania is deemed to have renounced her right to participate in the present procedure. By her abstention, Albania can neither affect nor limit the duty of the three Governments to distribute the stock of monetary gold found in Germany by the Allied forces, in accordance with the provisions of the Act of Paris.

" [(ii) *Interpretation of Agreements Incidental to Those Directly Submitted to the Arbitrator. Contemporaneous Interpretation.*]—In its correspondence with the Tripartite Commission, the Albanian Government contested at some length the validity of the revocation, decided on November 17th, 1950, by the Commission, of its earlier decisions of February 16th and June 30th, 1948, making a preliminary allocation of 1,121.4517 kilograms of gold. This question is not put to the arbitrator. The Washington Agreement provides in its Preamble that these latter decisions shall be regarded as a nullity; the three Governments have therefore covered with their authority the procedure followed by the Tripartite Commission pursuant to article 5, paragraph *e*) of its Terms of Reference of September 27th, 1946, which obliged the Commission to assist ' in such other ways as shall be decided by the three Governments establishing the Commission, in the distribution of the pool of monetary gold available for restitution.'

" As the arbitrator's competence has been substituted for that of the three signatory Governments, for the questions mentioned in the Washington Agreement, it may conveniently be defined with more precision by reference to the ' Statement to accompany publication of the Agreement between the Governments of the French Republic, the United Kingdom of Great Britain and Northern Ireland and the United States of America for the submission to an arbitrator of certain claims with respect to gold looted by the Germans from Rome in 1943.'

" It is clearly established by the judicial practice which has developed in International Law that an international judge or arbitrator is competent, not only to interpret the treaty which sets out his terms of reference, but also any other international agreement, if its interpretation must be regarded as incident to the decision of an issue he is competent to deal with.

" The aforesaid Statement, made on the same date as the Washington Agreement by the same three Governments which signed the latter, relates to the same question and to its possible developments; it was communicated to the arbitrator with the Agreement. The Italian Government, because it took no part in its elaboration, questions its relevance in the present proceedings. In the arbitrator's opinion, however, it should be taken into account insofar as it may help to throw some light upon his duties, in accordance with the principle of contemporaneous and practical interpretation of international acts, applied by the Permanent Court of International Justice in its Advisory Opinion of July 23rd, 1926 (*Competence of the International Labour Organization to regulate, incidentally, the Personal Work of the Employer.* Publications of the P.C.I.J., Series B, No. 13, page 19).

" It is provided in the abovementioned Statement that, should the Arbitrator's opinion state that Albania has established a claim, under Part III of the Act of Paris, to the gold looted from Rome, the three Powers would be confronted by another question because both the United Kingdom on the one hand and Italy on the other hand, maintain that the gold in question should be delivered to them.

" The United Kingdom contends that the gold should be delivered to it in payment of a sum of £843,947 that Albania has been condemned to pay, by Judgment of the International Court of Justice of April 9th, 1949, in respect of the deaths of and injuries to members of the British Navy and the loss of and damage to British Warships in the Corfu Channel, as a result of an undisclosed mine field, for which Albania was held to have a responsibility.

" Italy has asserted a claim to the gold in question and relied upon the Albanian Decree of January 13th, 1945, whereby Albania confiscated, without any compensation, the assets of the Bank, the shares of which were for the most part held by the Italian Government; the monetary gold held outside Albania was also comprised in the confiscation which, it was contended, could not have any extraterritorial effect under International Law. Italy also bases her claims upon the provisions of the Peace Treaty of February 10th, 1947; finally the effect of the said Italian Peace Treaty as regards the respective rights of the interested Parties would have to be considered.

" For these various reasons, the three Governments have agreed that:

' If the opinion of the arbitrator is that Albania has established a claim under Part III of the Paris Act to 2,338.7565 kilograms of monetary gold looted by Germany, they will deliver the gold to the United Kingdom in partial satisfaction of the judgment in the Corfu Channel case unless within 90 days from the date of the communication of the arbitrator's opinion to Italy and Albania either

'*a*) Albania makes an application to the International Court of Justice for the determination of the question whether it is proper that the gold, to which Albania has established a claim under Part III, should be delivered to the United Kingdom in partial satisfaction of the Corfu Channel judgment; or

'*b*) Italy makes an application to the International Court of Justice for the determination of the question, whether by reason of any right which she claims to possess as a result of the Albanian law of January 13, 1945, or under the provisions of the Italian Peace Treaty, the gold should be delivered to Italy rather than to Albania and agrees to accept the jurisdiction of the Court to determine the question whether the claim of the United Kingdom or of Italy to receive the gold should have priority, if this issue should arise.

'The Governments of the French Republic, the United Kingdom and the United States declare that they will accept as defendants the jurisdiction of the Court for the purpose of the determination of such applications by Italy or by Albania or by both.

'The three Governments agree to conform in the matter of the delivery of gold with any decisions of the International Court of Justice given as the result of such applications by Italy or by Albania.'

"The aforesaid Statement contemplates one hypothesis only: if the opinion of the Arbitrator is that Albania has established a claim for restitution of the monetary gold in question, under Part III of the Act of Paris, another problem arises, namely, whether this gold should be delivered to the United Kingdom or to Italy which both have asserted a claim to it.

"There can therefore be no doubt that the three Governments signatory to the Washington Agreement did not intend the Arbitrator's powers to comprise the determination of any problem related to such claims, and that the following questions and claims are outside his competence: the question of the eventual delivery of the gold to the United Kingdom in partial satisfaction of the judgement of the International Court of Justice of April 9th, 1949, in the Corfu Channel case, the question of the effect of the Albanian decree of January 13th, 1945, upon the rights claimed by Italy in respect of the Bank's gold, the Italian claim founded on the clauses of the Peace Treaty of February 10th, 1947. Besides, it would have been impossible for the three Governments to refer these questions and claims to the arbitrator for decision without going beyond the limits of their duty as fixed in the Act of Paris, for these claims for restitution of gold were not founded on the basis of Part III of the said Act of Paris. As possible disputes on this subject can only be settled by international—arbitral or judicial—proceedings with the consent of the States concerned, the Statement to accompany publication of the Washington Agreement provides that they may give rise to special proceedings, instituted in the International Court of Justice by Albania or by Italy, or by both, and that the aforesaid Statement shall be deemed to be, for these proceedings and for the time determined in the Statement, an acceptance of the jurisdiction of the Court by the three Governments which made the Statement.

"On the contrary, the determination of the question of the ownership of the gold wrongfully removed by Germany in 1943 from Rome to German territory, falls undoubtedly within the Arbitrator's competence, either, as a preliminary question, to ascertain if a right of ownership should determine or not whether the gold belongs to Albania or to Italy, or to neither of them, or, should the answer to this question be affirmative, to decide who is the legal owner; the solution of this problem depends on the interpretation of the terms used in the Washington Agreement (paragraph 2 (i), (ii) and (iii)), which is the foundation of the Arbitrator's competence. The Statement does not mention the determination of the question of ownership of the monetary gold looted and only precludes the arbitrator, should he hold that the gold belongs to Albania, from examining a possible opposition by the Albanian Government to the delivery of the gold to the United Kingdom in partial satisfaction of the debt established by the Judgment of the International Court of Justice of April 9, 1949, as well as certain Italian claims for delivery of that gold.

"Although he should not take into account considerations not adequately connected with the disputed points of law and of fact which he is requested to examine, the undersigned Arbitrator cannot fail to consider the reasons adduced by the Tripartite Commission in its decision of November 17th, 1950, and in the communication it made of this decision to Albania and to Italy in two letters dated December 5th, 1950, insofar as these reasons are related to Part III of the Act of Paris, signed by the three Governments parties to the Washington Agreement as well as by Albania, and subsequently adhered to by Italy in the Italian Protocol of December 16th, 1947. In the exercise of his duty, the arbitrator is therefore competent not only to interpret Part III of the Act of Paris, but also to appreciate questions of fact and of law implied by the carrying out of the said Act, as is provided in express terms by the Washington Agreement.

"In order to determine what questions of law and of fact are within his competence, the Arbitrator must consider the date of September 16th, 1943, which is the date of the looting from Rome of the Bank's gold and of its wrongful removal to Germany. He is bound to do so by the very wording of the questions put to him in the Washington Agreement; the use of the past tense, indicative mood, of the verb 'to belong' refers, not to a present, but to a past situation, which can only be that existing on September 16th, 1943. It follows that the arbitrator is not competent to deal with claims for restitution of looted gold motivated by events which took place after that date. In particular, the claim based on article 75, paragraph 8, of the Italian Peace Treaty, does not fall for determination by the Arbitrator, for two reasons: first, the aforesaid Peace Treaty, concluded on February 10th, 1947, did only enter into force on September 15th, 1947; second, it is established that the 2,338.7565 kilograms of gold which are here the subject of competitive claims, were looted from Rome by the Germans, and not from Albania by the Italians, so that they do not fall under that provision.

" The Arbitrator feels bound by paragraph 2 of the Washington Agreement, insofar as it limits his freedom of interpretation and requires him to ' bear in mind that his advice should be consistent with decisions already made in other cases by the Tripartite Gold Commission '. It must be pointed out in this connection that the decisions he should bear in mind are only those which have been made in other cases, that is to say final decisions of the Tripartite Commission allocating monetary gold to one of the Signatories of the Act of Paris or to a State entitled to participate in the pool, which may be communicated to all the Governments interested in the present arbitral proceedings. In the Arbitrator's opinion, provisional or preliminary decisions, or decisions which, by reason of their confidential nature or because they were arrived at after a confidential discussion in the Tripartite Commission, could not be circulated to all the Parties concerned, are not ' decisions ' within the meaning of paragraph 2 of the Washington Agreement. The arbitrator does not consider either as decisions with which his advice should be consistent, the decisions which gave rise to a disagreement between the Governments concerned and are the direct source of the dispute now submitted to him for settlement. In the course of the proceedings the Tripartite Commission informed the Arbitrator that no final decisions have been taken by them and, consequently, none of their drafts could be communicated either to the Parties or to the Arbitrator.

" III. The Law

" [(i) *Appropriation of Enemy Property by Belligerent Occupant. Booty. Postliminium.*]

" *A.*—The following submissions were presented by the Governments concerned:

" 1° The Government of the United Kingdom of Great Britain and Northern Ireland asks the Arbitrator to declare:
  - *a*) that the looted gold formed part of Albania's monetary reserve up to April 1939;
  - *b*) that the Convention of 20th April, 1939, did not alter the status of the looted gold as part of Albania's monetary reserve and it remained part of Albania's monetary reserve up to 16th September, 1943, or that, in the alternative, the Convention of 20th April, 1939, is to be deemed void and of no effect; and therefore,
  - *c*) that the looted gold was on 16th September, 1943, monetary gold belonging to Albania.

"2° The Government of Italy concludes that it may please the Arbitrator to declare in his advice that Italy has established that 2,338.7565 kilograms of monetary gold, which were looted by Germany from Rome in 1943, belonged to Italy.

"3° The Government of the French Republic presents the following conclusions:

a) that the gold looted by Germany from Rome in 1943 was not monetary gold as regards Italy and did not belong to her within the meaning of paragraph C of Part III of the Act of Paris on Reparation;

b) that although a part of Albania's monetary reserve, the gold did not belong to Albania within the meaning of paragraph C of Part III of the Final Act of Paris on Reparation;

and that, consequently, the gold in question belonged neither to Italy nor to Albania, within the meaning of Part III of the Act of Paris, and decisions of the Tripartite Commission for the Restitution of Monetary Gold in analogous cases being borne in mind.'

These three different submissions correspond to the three questions put to the Arbitrator by Article 2 of the Washington Agreement of April 25th, 1951; the First Memorial of the United Kingdom is therefore right in saying that the answer to one of them must be affirmative and the answer to the other two negative.

" The Government of the United States of America did not present any submissions during the present arbitral proceedings.

" The Government of the People's Republic of Albania, as was pointed out above, abstained from taking part in the proceedings, but the Government of the United Kingdom, because of the provisions agreed upon in the Statement to accompany publication of the Washington Agreement and under which it is entitled, provisionally at least, to the delivery of the monetary gold, should this gold be held to belong to Albania, assumed the position of a Party having an interest in supporting the claim of Albania.

" *B*.—Because of their different construction of several provisions of Part III of the Act of Paris of January 14th, 1946, on Reparation from Germany, on the Establishment of an inter-Allied Reparation Agency and on the Restitution of Monetary Gold the Governments concerned presented in the present proceedings mutually opposed submissions; it is therefore necessary to ascertain the origins of this Act, its effects and the result desired by the signatory Parties. This analysis will help to determine the objects and the purpose of this agreement.

" The arrangements for the restitution of monetary gold, as provided for in the Act of Paris, were made in pursuance of the principles evolved from earlier decisions of the Allied victorious Powers and indicated in the circular letter, dated March 13th, 1947, by which the Tripartite Commission informed the States concerned of its constitution and its composition; it is stated in this letter:

' In general, the concepts " of loss through looting by or wrongful removal to Germany ", which will guide the Commission, are those described

in the United Nations Declaration against Axis Acts of Dispossession, dated 5th January, 1943;

in the United Nations Gold Declaration of 22nd February, 1944;

and in Resolution VI of the Final Act of the United Nations Monetary and Financial Conference, dated 22nd July, 1944.'

In the Declaration of January 5th, 1943, signed in London, eighteen Governments of the Allied Powers, including the Governments of the United States, the United Kingdom and France (which was represented at that time by the French National Committee), reserved

' all their rights to declare invalid any transfer of or dealing with, property, rights and interests of any description whatsoever which are, or have been situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged to persons (including juridical persons) resident in such territories.

' This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form even when they purport to be voluntarily effected.'

" This document made no special mention of dealings with gold; they are nevertheless included in this declaration of invalidity, whose scope was meant to be as wide as possible.

" The Declaration of February 22nd, 1944, made by the United States, the United Kingdom and the Union of Soviet Socialist Republics, and subsequently adhered to by several other States, was based on the latter Declaration and chiefly aimed at transactions in respect of gold carried on by Neutrals with the Axis Powers during the Second World War. It stated that one of the particular methods of dispossession used by the Axis Powers was the illegal seizure of large amounts of gold belonging to the countries they occupied and looted; the Governments made then clear what steps they intended to take in order to promote the recovery of looted gold. One of these measures was the refusal to recognize any transfer in respect of looted gold, whatever the time of the disposal of this gold by the Axis on the world market.

" In the Final Act (Resolution VI) of the United Nations Monetary and Financial Conference of July 22nd, 1944 (Bretton Woods Final Act), the signatory Governments confirmed their determination to try to locate the looted gold and to take immediate measures in order to prevent any disposition or transfer, within territory subject to their jurisdiction, as well as to uncover, segregate and hold at the disposition of the post-liberation authorities any such gold found within territory subject to their jurisdiction.

" All this international action led to the conclusion of the Act of Paris of January 14th, 1946, whereby a fundamental distinction is established between reparation on the one hand, and restitution of monetary gold on the other, the latter being the subject of particular arrangements set forth in Part III of the aforesaid Act.

" The Law of Nations has developed towards an increased limitation of the occupant's rights in time of war. In the 18th century, the right of booty was still recognized by International Law, and was protected by several municipal legislations, as the Codex Maximilianus Bavaricus and the Preussisches Allgemeines Landrecht of 1794 which regulated the right of booty with precision. This right was not mentioned in the French Civil Code, nor in the civil legislations promulgated during the 19th and 20th centuries. Modern International Law rejected it entirely and affirmed the opposite principle in the two Regulations annexed, one to the Second Hague Convention of 1899, and the other to the Fourth Hague Convention of 1907, concerning the laws and customs of war on land which, in article 47, stipulates: ' pillage is formally forbidden '.

" The violation of this rule induced the States to admit a kind of postliminium in favour of the robbed owner. At first this new principle was only partially applied, in particular in the Treaty of Versailles of 1919 and in the other Peace Treaties which put an end to the First World War.

" This slow evolution of the Law of Nations became more pronounced in modern legal science and in State practice, since the Second World War. It is founded on the Roman concept of *postliminium*, whose signification it widened so that this term now means an invalidation of all acts contrary to the Law of Nations, performed in time of war by the occupant, and a revival, when the occupation is ended, of all legal relations illegitimately modified by the occupant in war, in their former condition and without payment of compensation; this is stated by, among several writers, Rivier, Principes du droit des gens, vol. II, p. 315, and Oppenheim-Lauterpacht, International Law (7th edition, 1952), vol. II, § 283, p. 619.

" This idea, much insisted upon by the Allied Powers during the Second World War, underlies the Declaration of London of January 5th, 1943, the United Nations Declaration of February 22, 1944 and the Bretton Woods Final Act of July 22nd, 1944, signed by all the United Nations. It is a manifestation of the juridical conscience of the modern world, manifestation which confers to this new concept the character of a rule of law, the more so because it has already given rise to judicial precedents and because, even in States which remained neutral like Sweden and Switzerland, legal rules departing from the provisions of municipal law were promulgated in order to make possible, in accordance with International Law, the recovery of property looted in occupied territories during the war.

" As applied to monetary gold, postliminium was regulated separately in Part III of the Paris Act of 1946, owing to the special importance of the looting by or wrongful removals of gold to Germany. In the single article of the abovementioned Part III (paragraph A), it was provided that the problem of monetary gold shall be treated as a whole and that claims for restitution should be submitted, quite different in character from actions to recover property, with the one following exception: gold coins of numismatic or historical value shall be restored directly if identifiable. In this case only, the legal owner may assert a property right and claim restitution of the same gold coins he was wrongfully deprived of. Monetary gold found in Germany, which does not offer these features, was pooled for proportional distribution among the countries admitted to participate under the Act of Paris, namely in proportion to their respective losses of gold through looting by or wrongful removal to Germany.

" None of the countries which suffered losses of monetary gold has a right to recover possession of the gold coins, bars or ingots of gold which were taken from it, even if it were possible to identify the gold it originally possessed. Each of these countries has only a claim for delivery of a certain quantity of gold in proportion to its losses of monetary gold. It follows that restitution does not necessarily depend on the proof of the ownership of gold looted or wrongfully removed to Germany, but on the proof of the losses each State suffered in its reserve of monetary gold.

" The Act of Paris of 1946 gives no definition of monetary gold and this concept is not defined either in the Declarations of the United Nations of January 5th, 1943, and February 22nd, 1944, and in the Bretton Woods Final Act of July 22nd, 1944. It may have two different meanings.

" According to the Dictionary of Littré, it may mean metal coins used for exchange, stricken in gold by a sovereign authority and which bear the official stamp of that authority; in this sense, only those gold coins which are legal tender in the States which minted them are monetary gold, this cannot be the acceptation adopted in the Act of Paris, which contrasts monetary gold, as understood in Part III, whose restitution may be claimed only by Governments which suffered losses through looting or wrongful removals for which Germany has a responsibility, and non-monetary gold, as mentioned in Part I, article 8, paragraphs A and F, which, found also in Germany by the Allied Armed Forces, shall be allocated to the ' rehabilitation ' and ' resettlement ' of non-repatriable victims of German action, and its restitution cannot be claimed by these Governments under Part III of the Act of Paris.

" The term ' monetary gold ' may also signify in a more technical sense gold in the form of coins, bars or ingots, used as a cover for the note-issue which is the recognized legal tender in one of the States signatories of the Act of Paris. This is the proper meaning of the term, under Part III of the said Act: it explains the proportionate restitutions provided for therein in favour of States victims of

German action, so that each of them may equitably reconstruct or consolidate its monetary system. The undersigned arbitrator is much inclined to adopt the latter interpretation, the more so because all the Parties which took an active part in the present arbitration recognized that the gold looted from Rome in 1943 by the German Armed Forces was monetary gold, its function being to cover the Albanian note-issue.

" *C.* In order to carry out Part III of the Act of Paris, the Tripartite Commission adopted the following definition of monetary gold, which it communicated to all the Signatories of the Act of Paris, to Austria, Italy and Poland, by letter of March 13th, 1947:

'All gold which, at the time of its looting or wrongful removal, was carried as a part of the claimant country's monetary reserve, either in the accounts of the claimant Government itself or in the accounts of the claimant country's Central Bank or other monetary authority, at home or abroad.'

" The tests thus laid down by the Tripartite Commission for the determination of the monetary character of a particular stock of gold met with the opposition of the Italian Government, which, in a letter to the Commission dated January 15th, 1950, found them insufficient because, in its opinion, the Commission had not taken into account the case of the gold of the National Bank of Albania and its distinctive and probably unique features. In fact, all the difficulties created by the distribution of the monetary gold involved in the present arbitration result from the following characteristics: the Albanian monetary reserve was not the property of the Albanian State but was made [up] of a quantity of gold owned by a private bank which had purchased it out of its own funds, derived from foreign shareholders; this bank's juridical seat was in Tirana whereas its administrative seat was in Rome where, so as to protect it from possible interference by the Albanian Government, the metallic reserve which covered the Albanian bank-notes recognized as legal tender for payments in Albanian territory, under Article 15 of the Bank's Organic Law of June 23rd/July 5th, 1925, was also deposited.

" Italy maintains that the definition of monetary gold, technically set out by the Tripartite Commission, is not sufficient to set aside her claim preliminarily, for if it aims at indicating what elements are necessary to establish the monetary nature of the claimed gold, it does not aim at determining who is entitled to restitution.

" The definition of monetary gold adopted by the Tripartite Commission is not one of the ' decisions already made in other cases ' which the Arbitrator must bear in mind under Article 2 of the Washington Agreement, but it is consistent in all respects with Part III of the Act of Paris. This Act provides for the restitution of looted monetary gold, so as to restore the national economy of States victims of German looting and to enable them to replace, as far as possible, the gold covering their note-issue; the claimant's acceptance of the portion of monetary gold accruing to it means that Germany's debt, on the ground of the restitution of monetary gold, is unconditionally and finally extinguished.

"It follows that the formula suggested by the aforesaid Commission in order to define the meaning of monetary gold does not conflict either with the origins of the Act of Paris or with its effects or with the result desired by the Signatories and accepted by the States which subsequently adhered to that Act. Although incomplete in so far as it does not permit, merely by applying it, to allocate with certainty monetary gold in cases as doubtful and intricate as that of the Albanian Bank's gold reserve, this formula sets out certain tests which constitute a first series of conditions to be satisfied before a claimant country is entitled to a proportional share of the gold pool under Part III of the Act of Paris. Each claimant country must show that:

on the date of the looting by or wrongful removal of the gold to Germany, it formed part of its monetary reserve,

1° either in the accounts of its Government,
2° or in the accounts of its Central Bank,
3° or in the accounts of another monetary authority, at home or abroad.

"On September 16th, 1943, the National Bank of Albania, a private bank administered, managed and controlled by foreigners, was still entrusted with the functions of a bank of issue and was the central bank of Albania. This is clearly shown by Article 15 of the Organic Law of June 23rd/July 5th, 1925, which merely provides for the implementation of clause 6 of the Banking Convention of March 15th, 1925, approved by the Albanian legislature at the same time as the Organic Law; this Article stipulates:

'The purpose of the Bank is to exercise its exclusive privilege of issuing paper money recognized as legal tender and valid for payments in Albania. It also enjoys the exclusive privilege of providing for the minting and issue of gold and metallic currency on behalf of the Albanian Government, the profits on which are divided in equal parts between the Albanian Government and the Bank.'

"It is not disputed by the Parties that the gold looted and removed by Germany formed the metallic reserve of the new Albanian currency, the Albanian franc, created by the Bank at the very beginning of its activity as a bank of issue, nor that this gold was at all times carried on the books of the Bank's seat until September 1943.

"In her Memorials and during the oral proceedings, Italy declared that she did not intend to rely on the Economic, Monetary and Customs Convention concluded on April 20th, 1939, between Italy and Albania, whereby (Articles 10 and 11) the value of the Albanian franc was established at the fixed parity of 6.25 Italian lire, and the cover of the circulation of the National Bank of Albania was to be composed of Italian lire and bank-notes of other credits on the Bank of Italy, so that the Albanian franc would have the same gold cover as the Italian lira. This convention comes within the provisions of Article 31 of the Italian Peace Treaty of February 10th, 1947, declaring null and void all agreements and arrangements made between Italy and the authorities installed in Albania by Italy from April 7th, 1939, to September 3rd, 1943. This Convention, however, had never led to modifications in the books of the National Bank of Albania, and the Bank's gold reserve was never carried on the books of the Bank of Italy.

" It follows from the abovementioned considerations that the gold looted by or wrongfully removed to Germany and involved in the present arbitration, was Albanian monetary gold on September 16th, 1943, and that, as it did not form part of the Italian monetary reserve, Italy cannot claim its restitution as monetary gold inasmuch as, in fact and in law, it never appeared as such among the assets of the Italian Government, or of the Bank of Italy, or of any other monetary authority in Italy or abroad. Insofar as Italy's claim relates to Albanian monetary gold, the Arbitrator holds that a State's claim to monetary gold admitted by it to be the metallic cover for the note-issue of another State, is consistent neither with the letter nor with the spirit of the Act of Paris; the first condition which any State claiming restitution of monetary gold must fulfil is to show that it suffered losses in the metallic reserves covering its own currency. Italy has never contended that this was the case for the gold involved in the present arbitration.

" The Tripartite Commission took precisely the same view, at the beginning of its activity, when it explained in its circular letter dated March 13th, 1947 that it could not 'recognize claims put forward by one Government on behalf of another Government or on behalf of the Central Bank or other monetary authority of another country.' A State cannot claim for itself delivery of gold which covers the note-issue of another State.

" *D.*—The question, which country the gold belonged to within the meaning of Part III of the Act of Paris, is not necessarily solved by the definition of monetary gold; the allocation of the looted gold to the claimant State which has shown that the conditions of a formal and book-keeping nature, set out in the decision of the Tripartite Commission, were satisfied, has given rise to much controversy between the Parties concerned.

" The Governments of France and Italy contend that the allocation of gold should be made on the basis of the property rights established, as regards a State claiming restitution, on September 16th, 1943, to the Bank's reserve of monetary gold affected to Albania's needs. According to the French and Italian Memorials, the ownership of the gold at that time is the decisive factor for its allocation.

"The two Governments rely upon the text of the Washington Agreement which requests the arbitrator to give an advice on this question and to determine whether Albania or Italy has established that the gold 'belonged' to it when looted by the German Armed Forces, or whether neither Albania nor Italy has established that this gold belonged to either of them. The same expression is used in Part III (paragraph C) of the Act of Paris, which provides:

'A proportional share of the gold shall be allocated to each country which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount *of monetary gold belonging to it* was looted by Germany or, at any time after March 12th, 1938, was wrongfully removed into German territory.'

"They also rely upon the conclusion of the Washington Agreement, which would have been superfluous, had the three signatory Governments considered that the problem of allocating the gold was solved by the definition of monetary gold, and that, in other words, the fact that the gold was destined to cover the circulation of the Albanian note-issue determined decisively who was entitled to restitution; had the three Governments taken this view, the final allocation to Albania of the gold in question would have followed necessarily. As the decisions of February 16th and June 30th, 1948 of the Tripartite Commission were revoked by it and were regarded as a nullity under the Washington Agreement, the Governments of France and Italy maintain that it is necessary to establish which country the gold in question belonged to, on September 16th, 1943, that is to say to resort to the concept of ownership. They infer from this that the gold should be restored to the claimant country whose 'patrimoine national' it was part of, because the Bank was created and its metallic reserve was purchased out of funds furnished by citizens of that country; its metallic reserve is therefore an integral part of its 'patrimoine national'.

"The standpoint of the French Government is somewhat narrower than that of the Italian Government, for it entails restitution of the looted monetary gold only to the claimant State which shows both that the gold in question was part of its monetary reserve, and that the State was owner of the gold either directly, or indirectly through its national bank of issue, the shareholding in which must for the most part be in the hands of the said State or of its citizens, but always provided that this gold can be regarded as a part of its 'patrimoine national'. It follows that, if the claimant State's central bank is controlled by a majority of foreign shareholders, the monetary gold wrongfully removed from it could not be distributed by way of restitution in pursuance of Part III of the Act of Paris.

"The Government of the United Kingdom contests this interpretation and puts forward another interpretation, according to which the expression 'monetary gold belonging to it', used in the

Act of Paris and also in the Washington Agreement, means: ' gold forming part of the claimant country's monetary reserve '. It contends that the terms ' belonging to it ' should be understood in their economic and functional sense and not in the sense of legal ownership, and that, where gold is held by a bank for the purpose of being used as the monetary reserve of a country, for the issue of the authorized medium of exchange or the maintenance of credit, it is said to belong to the country which has constituted the bank as its agent for this purpose. In short, the expression ' monetary gold belonging to it ' does not mean, in its opinion, that the claimant State must also be the legal owner of the gold which forms part of its monetary reserve.

" [(ii) *The Principle of Effectiveness in the Interpretation of Treaties.*]—1.—These differences of interpretation are likely to have some repercussions, not on Italy's rights, but on Albania's rights to claim restitution of the monetary gold which, she contends, belongs to her.

" Even if it were admitted to be correct, for discussion's sake, the Italian interpretation of Part III (paragraph C) of the Act of Paris, and of the questions put to the arbitrator in the Washington Agreement, could not lead to a result favourable to Italy, inasmuch as the Agent of the Italian Government, confirming a previous statement made in the written proceedings, formally declared, during the oral hearing, in order to avoid any misunderstanding: ' Italy has never claimed to be the owner of the gold. The gold involved here is, and always has been, the property of a legal person named the National Bank of Albania '. After showing that the Bank was created in Italy on the initiative of the Italian Government following a recommendation of the Financial Committee of the League of Nations, that its gold reserve was purchased by use of currencies supplied by the Italian economy, and that 89 per cent. of the Bank's capital was acquired by the Italian State from Italian private groups, the Agent of the Italian Government expressly declared, in the written proceedings, that he had never contended that Italy was the owner of the gold because she was the principal shareholder in the Bank.

" The Italian Government claims restitution of the gold reserve in question because it belongs to Italy—in its opinion—within the meaning of Part III of the Act of Paris, as a part of her ' patrimoine national ' and because the National Bank of Albania, which has not gone into liquidation, should recover its gold reserves in order to be able to pay its debts and to be compensated for the obligations it had undertaken with respect to the monetary circulation.

" Such a claim is manifestly outside the scope of the Act of Paris, which established a procedure for the restitution of monetary gold in favour of States, and not of private persons, physical or juridical, and which does not contain any provision on the protection of investments made by financial groups, or even by a State, in the bank of issue of a foreign State.

"The contention that the right to the restitution of monetary gold depends on the gold being a part of the claimant State's 'patrimoine national' finds no support whatever in the Act of Paris. This idea could only be accepted if it were defined in the said Act, for the fact that the gold forms part of the 'patrimoine national' may result from many different causes: from the origin of the funds out of which the gold reserve was acquired, from the control exercised by the citizens of one State upon a foreign bank of issue at the time of its creation, from subsequent changes in the predominance of the interests of one State or the other in the bank of issue, or from other factors. The Act of Paris gives no indication whatever, which can help to choose between these various ways of defining juridically the notion of 'patrimoine national'; it seems established that the claims submitted by the Governments of the Tripartite Commission were never based on this concept of 'patrimoine national'.

"Three insurmountable difficulties prevent therefore the Italian Government from succeeding in its claim to the gold:

a) the gold in question is Albanian monetary gold, and not Italian monetary gold;

b) neither the Italian State nor its central bank of issue has ever owned the gold in question, which was never carried on the books of any Italian public or private Bank, but was carried on the books of the National Bank of Albania, created under Albanian law;

c) insofar as the gold in question was purchased out of Italian investments in the said Bank, which the Italian Government intends to protect, its claim falls outside the powers given by the Act of Paris to the three Governments signatories of the Washington Agreement and, consequently, outside the competence of the undersigned arbitrator, as defined in the aforesaid Agreement.

"2.—As regards Albania, the question of the ownership of the monetary gold arises in a manner, and assumes an aspect, altogether different, for it is established that the gold looted or wrongfully removed from Rome to Germany was, on September 16th, 1943, cover for the Albanian note-issue and had the character of Albanian monetary gold.

"It becomes necessary therefore to examine whether this character is sufficient to warrant an allocation of the gold to Albania or whether a supplementary condition should still be satisfied.

"In other words, the question is whether the words 'monetary gold belonging to it' [the country concerned], used in Part III, paragraph C, of the Act of Paris and reproduced in the Washington Agreement, must be taken to mean: 'gold forming part of the claimant country's monetary reserve '—or, on the contrary: 'gold owned by the claimant country, or possibly by a bank or bank of issue under its control',—or, finally: 'gold forming part of the claimant country's *patrimoine national*'.

"It is unanimously recognized by the science of International Law that, as a starting-point of the process of interpretation of interstate conventions, it is advisable to take the usual meaning of the terms used by the Contracting Parties and to depart from it only when it is incompatible with the intent and purpose of these conventions.

"In French, the term 'appartenir à' calls to mind, *prima facie*, the idea of ownership, as is shown by the definition given in Littré's Dictionary: 'être la propriété de'. In English, the expression 'belong to' may mean the same thing and is defined as follows in the *Shorter Oxford English Dictionary*, of C. T. Onions: 'to be in the rightful possession of'. In its Questionnaire on Gold, the Tripartite Commission constantly uses the words 'propriétaire de l'or perdu', in English 'owner of gold lost', or the words 'l'or monétaire qui appartient au Gouvernement demandeur', in English 'gold owned by the claimant Government', or 'la preuve de la propriété', in English 'evidence of ownership', thus clearly referring to the rights of ownership to the gold looted or wrongfully removed which are a necessary condition of the restitution provided for in Part III of the Act of Paris. It must be pointed out, however, that the Tripartite Commission, in the interpretation just quoted of the words 'appartenir à' or 'belong to', was not considering only a Government's rights of ownership but also the rights of its Central Bank or of another monetary authority under its control. In so doing, the Commission broadened singularly the meaning of the words used in Part III, paragraph C, of the Act of Paris, for these words, taken literally, only signify that the monetary gold should belong to one of the claimant countries.

"The latter acceptation of the terms 'belonging to' cannot have been intended by the Signatories of the Act of Paris for, as a result of it, restitution of the monetary gold would only be made to those States which are able to show they had a definite right of legal ownership to the gold at the time of the looting or wrongful removal.

"Now, it is well known that most States did not grant the exclusive privilege of issuing bank-notes recognized as legal tender and valid for payments to State banks proper which, forming an integral part of a public administration, hold a metallic reserve owned by the State which constituted them; most States gave this privilege to private banks or to financial establishments of a mixed character, whose legal personality is distinct from the State's, and which possess therefore private law rights of ownership to the monetary reserve covering the circulation of the note-issue recognized as legal tender. The State often keeps the right to intervene in the administration of these banks or establishments; it can supervise their business and sometimes veto measures it deems contrary to its own interests or to monetary security; it often shares in the profits which the banks derive from their activity. The banks of issue retain none the less their private character; they are often joint stock companies whose capital has been partially or wholly subscribed by private shareholders, sometimes without the State's participation.

" Even when they take the form of purely private financial establishments, or semi-public and semi-private, the banks invested with the exclusive privilege of issuing bank-notes recognized as legal tender and valid for payments, discharge a function which affects the economic prosperity of the entire community, since they have to regularize all money transactions. When creating them, the State aimed less at drawing profits from their activity than at making the whole national community share the advantages of monetary stability.

" The negotiators of the Act of Paris cannot have been ignorant of this situation nor can they have stipulated, consequently, that the right to recover monetary gold would depend on the claimant State's ownership; neither the intent nor the purpose of the aforesaid Act is consistent with this interpretation, which would lead to the consequence that many States, whose monetary gold was looted or wrongfully removed to Germany, would be denied the right to receive a proportionate share of the gold pool to be distributed by the Tripartite Commission.

" It is therefore more in keeping with the effect and purpose of the Act of Paris to give the words ' belong to ' the meaning which they have also in French, according to Littré's Dictionary and which corresponds to their Latin etymology, ' pertinere ', to concern, to relate to, a meaning accepted also in the English language, according to the *Shorter Oxford English Dictionary* of C.T. Onions, for the expression ' belong to ', defined as follows: ' to pertain, to relate, to concern ', whereas the idea of proprietorship is better conveyed by the verb ' to own '.

" From the foregoing it follows that the right to a proportionate share of the monetary gold must be recognized, under Part III of the Act of Paris, to each of the countries concerned able to establish that a definite quantity of monetary gold concerning it or relating to it has been looted by Germany or wrongfully removed to German territory. This interpretation is confirmed by paragraph 5 of the Washington Agreement whence the following formula was used to convey the idea of gold belonging to a State: ' the three Governments . . . will accept the advice given by the Arbitrator on the question whether Albania, or Italy, or neither has established a *claim* to the aforesaid amount of gold '. These claims may result, in the first place, from the claimant State's ownership of the monetary gold at the time of its looting or wrongful removal, but also from the fact that, the claimant State not being itself the owner, its bank of issue, which possesses a legal personality distinct from the claimant State's, is the owner of the monetary gold in question, whereas the location of its seat at home or abroad is immaterial.

"This interpretation given by the Arbitrator of the words 'to belong to' tallies with that suggested by the Government of the United Kingdom, which contends that the words 'belonging to' are used in an economic, functional sense, that is to say that it is sufficient that a relation should exist between the gold and the claimant State's monetary system.

"The arbitrator holds that it does not behove him to qualify legally on what basis the monetary gold shall be delivered to the United Kingdom under the Statement to accompany publication of the Washington Agreement which provides that 'if the opinion of the arbitrator is that Albania has established a claim under Part III of the Paris Act to 2,338.7565 kilograms of monetary gold looted by Germany, they (the three Governments) will deliver the gold to the United Kingdom in partial satisfaction of the judgment in the Corfu Channel case'. He may content himself with pointing out that the Act of Paris does not stipulate that States have any action for the recovery of monetary gold, even when identified, and that the delivery to the United Kingdom of the share allocated to Albania is only provisional, for it may be questioned in subsequent proceedings initiated in the International Court of Justice either by Albania, or by Italy, or by both, should these countries wish to assert rights preferable to those of the United Kingdom, on the various grounds mentioned in the Statement.

"The arbitrator is unable to accept the conclusions of the French Government that Italy's claim should be rejected because the gold is not owned by this State and cannot be qualified as Italian monetary gold and that Albania's claim should be rejected as well because, although the gold must be considered as Albanian monetary gold and is owned by the National Bank of Albania, it does not form part of this country's 'patrimoine national'. These submissions have the defect of leaving unsolved the question of the restitution of the Albanian monetary gold.

"This concept of forming part of the claimant State's 'patrimoine national' can be relied upon neither against Albania nor in favour of Italy, for reasons pertaining to its uncertainty and which were developed above when examining the claims of the latter State. Neither the very small participation of Albanian citizens in the subscription of the Bank's share capital, nor the constant diminution of their interests following the purchase of their shares by the Italian financial Group, nor the acquisition of the majority of the shares by the Italian Government, nor the predominance that

Italian financial circles finally secured in the administration of the Bank, nor the Bank's double seat—one in Tirana for the Central Direction and the other in Rome for the Council and the Board of Management—nor the deposit of the reserve of monetary gold in Rome, decided by the Board of Management pursuant to Article 22, paragraph 3, of the Organic Law and to the corresponding Article of the Statute, can support the contention that the monetary gold did not form a part of Albania's 'patrimoine national' and did not belong to her, within the meaning of Part III, paragraph C, of the Act of Paris, while it was cover for her note-issue.

" It would hardly be satisfactory to hold that the gold looted by Germany from Rome in 1943 belonged neither to Italy nor to Albania, notwithstanding that none of the Parties concerned ever questioned its monetary character under the aforesaid Act, which provides for its proportional restitution to the States which lost it for the reasons and in the conditions indicated therein.

" This standpoint would lead to the conclusion that the purpose of the Act of Paris would be defeated as regards the Albanian monetary gold; it is contrary to one of the most established principles in the law of Nations, viz. that international agreements should be interpreted so that they can have a certain effect.

" The gold, whose monetary character is recognized by all the Parties, must have this character in relation to one country for, unless it can be connected with the currency of one State, it will lose its nature of monetary gold as it is not able to function as such; the provisions of Part III of the Act of Paris would not be applicable to it and would lose all efficacy as regards Albanian monetary gold. It is impossible to admit that stocks of gold, whose monetary character was never questioned in the course of the present arbitration, do not belong to any country.

" In its answer to the Tripartite Commission's Questionnaire on Gold, Albania indicated as the owner of the monetary gold she claimed, the State Bank of Albania, created by the Organic Law of the State Bank of Albania, of January 13th, 1945, after promulgation, on the same date, of the Law No. 38 on the Nullification of the Convention concerning the National Bank of Albania and its shares, which transferred all the assets and liabilities of the latter Bank to the Albanian State. The arbitrator cannot take into account changes in the juridical position of the Parties concerned which took place after September 16th, 1943, date of the looting or wrongful removal of the gold from Rome by the German Armed Forces. At that time the State Bank of Albania was not in existence; the rights of ownership which it asserts today cannot be considered, and it is even unnecessary to examine whether the nationalization of a bank may have effects upon assets situated outside the territory of the nationalizing State. On that same date, the Albanian State was not the owner either of the monetary gold involved here, as is proved beyond all question by the promulgation of the Law of January 13th, 1945, since it deemed it necessary to confiscate the Bank's assets in an attempt to assert its ownership.

" Albania's answers to the Questionnaire on Gold, legally erroneous though they may be, cannot lead, however, to the rejection of her claim, for the Government of the United Kingdom, placing itself exactly on September 16th, 1943, maintains for other reasons that the gold belonged to Albania.

" On that date, it is true, the monetary gold was owned by the National Bank of Albania, which has never gone into liquidation. The latter bank, a joint stock company, therefore a private law juridical person, had received from the Albanian Government the exclusive privilege of issuing bank-notes on Albanian territory and of minting the metallic currency, absolutely and irrevocably, for fifty years at least, under clauses 4 and 13 of the Banking Convention. The function of its metallic reserve was undoubtedly to cover the Albanian note-issue and, in this connection, it cannot be denied that the monetary gold, without being the property of the Albanian State, concerned, and was related to, this State, for it was the property of a Bank which, in its financial economy, played the part of a central bank, and had always been as regards Italy a foreign company governed by Albanian law, subject to subsidiary application of Italian law, owing to the insufficiency of Albanian law concerning joint stock companies.

" Part III of the Act of Paris aims at restoring the monetary gold looted by Germany to its original function, which was to be the metallic cover for the currency of the State issuing it.

" However, this Act provides for its restitution among the countries admitted to participate in the pool only in proportion to ' their respective losses of gold through looting or by wrongful removal to Germany ' (paragraph A); it provides further that any allocation of monetary gold shall be accepted by the claimant State ' in full satisfaction of all [its] claims against Germany for restitution of monetary gold ', without prejudice to claims by way of reparation for unrestored gold (paragraph B).

" It is clear that the situation of the National Bank of Albania is so particular that it is unlike that of all the banks of issue which carry out business in other States and have much closer connections with the State whose monetary stability they have to maintain. If it is established that no gold was ever directly drained from Albania to Italy, it is none the less certain that the depreciation of the Albanian franc dates from the time of the Italian occupation, which led to the issuing of large quantities of Albanian bank-notes; under the Economic, Monetary and Customs Convention of April 20th, 1939, then in force between Albania and Italy, these notes were only covered by Italian lire, so that the Albanian franc had, from then on, no other gold cover than that for the Italian lira.

The looting or wrongful removal of the Bank's gold reserve from Rome to Germany in 1943, made more difficult, if not impossible, any valorization of the Albanian franc. Albania's financial economy was therefore shaken and jeopardized because of the losses suffered in the metallic reserve covering the note-issue; Albania has, on this ground, a claim against Germany, which may be settled by means of allocations from the gold pool, in pursuance of Part III of the Act of Paris, these allocations being accepted by Albania in full satisfaction of all her claims against Germany for restitution of monetary gold.

"The fact that the Bank's metallic reserve remained at all material times deposited in Rome is not decisive, for article 22, paragraph 3, of the Organic Law and the corresponding article of the Statute merely empower the Board of Management to decide where the reserve shall be deposited. In the exercise of the powers it had received from the law and the Statute, the aforesaid Board decided that the reserve should be held in Rome, a choice dictated neither by the law nor by the Statute. From the written evidence presented during the proceedings it does not follow that the Bank was directly created under the auspices of the League of Nations, but rather that it was constituted after the first attempts of the League had been abandoned, by a group of Italian financiers who took all the risks involved in the creation of a new financial establishment intended to consolidate the credit and the currency of Albania. They chose to deposit the metallic reserve in Rome in order to limit these risks, which high finance in London and Paris had been unwilling to incur. The monetary gold was not as a result of their choice subjected to a particular legal status, which the simple observations and the advice contained in the Calmès Report were insufficient to create in law.

"Likewise, the decisions made at the Paris Peace Conference in 1946 are not conclusive. On October 2nd, 1946, the Economic Commission for Italy rejected an Albanian proposal for the restitution of the gold reserves of the National Bank of Albania which had remained in Italy, a decision confirmed on October 9th, 1946, during the 35th meeting of the Plenary Session of the Conference. However, as pointed out in the French Memorial, the aforesaid Treaty nowhere provides that Albania renounces her claims to the gold. The question was left open.

"For the same reason, it could not be proved, in the present proceedings, that Albania had already been compensated for the loss of her monetary gold with reparations to be paid by Italy, in pursuance of the Peace Treaty; nothing in the latter permits to consider that article 74, paragraph B, which gives Albania an amount of 5 million dollars by way of reparation, to be paid by Italy, and article 79, which allows Albania to seize, attach and liquidate all the Italian property, rights and interests within her territory, compensate for losses of a monetary character. The question of the monetary gold was not settled therefore by the Treaty and was indeed dealt with in Part III of the Act of Paris, signed by Albania who has, on this basis, the right to put forward her claims, like all the other States entitled to similar reparations under the Italian Peace Treaty.

" From all the facts and all the legal considerations which it is proper for the three Governments to take into account under Part III of the Act of Paris, it follows:

1° that the gold looted from Rome on September 16th, 1943, by the German Armed Forces, was at the time the metallic cover for the Albanian note-issue, and therefore Albanian monetary gold;

2° that the Economic, Monetary and Customs Convention concluded between Italy and Albania on April 20th, 1939, did not change the metallic cover for the Albanian note-issue, as this Convention was declared null and void by Article 31 of the Italian Peace Treaty, on February 10th, 1947;

3° that a right to restitution of a proportionate share of the monetary gold, under Part III of the Act of Paris, does not depend upon the proof of the claimant State's ownership of the gold, ownership which, it may be added, has been established neither in the case of Albania nor in the case of Italy;

4° that the claimant State needs only establish that the looted gold was cover for its note-issue on the date of the looting or wrongful removal of the gold;

5° that it is established that the gold in question was the property of the National Bank of Albania, a juridical person created under Albanian law, invested with the exclusive privilege of issuing Albanian bank-notes recognized as legal tender and valid for payments in Albania, and that it constituted the metallic cover for the aforesaid notes."

[Report: Unpublished.]

Treaties—Interpretation of—Principles of—*Expressum facit cessare tacitum.*

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Principles of—Rules of Good Faith.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Various Rules of—Interpretation by Reference to Other Provisions in Same Instrument.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Rules of—Disparate Parts of Treaty Interpreted as Complementary to Each Other.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Principles and Rules of Interpretation—Interpretation by Reference to the Practice of Signatory Government.

See p. 233 (*Kren Claim*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to "Traditional Policy" of Signatory Government.

See p. 434 (*Miljus Claim*).

Treaties—Interpretation of—Principles and Rules of—Interpretation by Reference to Prior Similar Treaty.

See p. 434 (*Miljus Claim*).

IV.—Consideration of Preparatory Work

Treaties—Interpretation of—*Travaux préparatoires.*

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Principles and Rules of Interpretation—Consideration of Preparatory Work.

See p. 233 (*Kren Claim*).

Treaties—Interpretation of—Consideration of Preparatory Work—By Municipal Court—The Warsaw Convention of 1929.

See p. 417 (*Komlos* v. *Compagnie Nationale Air France; Royal Indemnity Co.* v. *Compagnie Nationale Air France*).

V.—Miscellaneous

Treaties—Interpretation of—Miscellaneous—Title of Annex of Treaty.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

Treaties—Interpretation of—Interpretation of Treaty of Peace—Effects of Waiver of Claims and "Save Harmless" Provision.

See p. 223 (*Neri* v. *United States*).

Treaties—Interpretation of—Restrictive Interpretation—Most-Favoured-Nation Clause—Right of Non-resident Alien to Inherit Property from Resident of State Concerned.

See p. 292 (*In re Arbulich's Estate; Arbulich* v. *Arbulich*).

Treaties—Interpretation of—Avoidance of Conflict with International Law.

See p. 197 (*Lauritzen* v. *Larsen*).

E—SPECIAL KINDS OF TREATIES

II.—Peace Treaties

Treaties of Peace—Performance of—Restitution and Reparation—Periods of Prescription—Restitution of Railway Rolling Stock—Limits of Restitution—Nature of Obligation as to Vehicles Returned before the Coming into Force of Treaty—Parallel Fulfilment of Obligations of Reparation under Other Instruments—Compliance with Directions of European Central Inland Transport Organization—Property Alleged to have been Removed Otherwise than by Force or Duress—Burden of Proof—Obligation to Carry Out Repairs in a Given Place—Treaty of Peace with Italy, 1947—Interpretation of Treaties—Principles of—Governing Force of Prior International Instruments—*Expressio unius est exclusio alterii*—Principle of Good Faith.

FRENCH STATE RAILWAYS CLAIM.

Franco-Italian Conciliation Commission. March 10, 1953.
(Bolla, Perier de Ferral, Sorrentino.)

THE FACTS.—After the termination of hostilities in Italy, in the spring of 1945, the Allied Control Commissions found in the peninsular a considerable quantity of rolling stock belonging to the French State Railways (S.N.C.F.). A large part of this rolling stock had suffered damage, either as the result of war or by reason of lack of maintenance, and needed to be repaired before it could be put back into service.

On September 27, 1945, all the United Nations (except the United States of America) established the European Central Inland Transport Organization (E.C.I.T.O.), whose object was " to provide for co-ordination both in the movement of traffic and in the allocation of transport equipment and material " " upon the liberation of the territories of the United Nations in Europe ". Paragraph 8 of Article VII of the Agreement which established E.C.I.T.O. provided:

> " 8. The Organization shall arrange, as soon as practicable, to restore to any member Government transport equipment and material belonging to it or to its nationals, found outside the territories under its authority and outside its control. Should any difficulties of identification arise, the Organization shall arrange immediately for such special measures to be taken as may be necessary to meet them. . . ."

Early in 1946, the S.N.C.F., in an endeavour to obtain as soon as possible the rolling stock belonging to it which was in Italy, sent a mission into that country.

In the course of a meeting organized at Rome on March 8, 1946, by E.C.I.T.O., in which the French mission and representatives of the Italian Railways took part, it was decided that the rolling stock belonging to the S.N.C.F. which was in Italy should, during the following months, be so far as possible used for traffic to France and exchanged, wagon for wagon, with Italian rolling stock then in France; the damaged French rolling stock would be withdrawn after the Italian Railways had carried out essential repairs to enable the wagons to proceed. Moreover, in order to comply with the requirements of E.C.I.T.O., the exchange of damaged wagons between France and Italy was to be carried out without compensation.

The Italian administration claimed that the locomotives sent back to France were restored during the months of December 1943 and January 1944 and in pursuance of the above-cited requirements of E.C.I.T.O. These locomotives, which had been levied in France in the condition in which they were found (in some instances damaged), were almost all put into proper running order by the railway depots at Novara and Milan and were sent in good condition to the depot at Nice. It was not contested, on the other hand, that damaged wagons, carriages and vans restored by Italy were repaired in the workshops of S.N.C.F. or by private contractors at the expense of S.N.C.F.

On February 10, 1947, the Treaty of Peace between the Allied and Associated Powers and Italy [hereinafter called " the Treaty "] was signed. The present claim was brought under Article 75[1] of the Treaty, for reimbursement of the costs of repair and restoration of the damaged rolling stock returned to France.

For the Italian Government, it was argued, *inter alia*, (i) that the claim was out of time, having regard to the second sentence of

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[1] Paras. 1, 2, 3, 6 and 7 of Article 75 provide:

" 1. Italy accepts the principles of the United Nations Declaration of January 5, 1943, and shall return, in the shortest possible time, property removed from the territory of any of the United Nations.

" 2. The obligation to make restitution applies to all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession.

" 3. The Italian Government shall return the property referred to in this Article in good order and, in this connection, shall bear all costs in Italy relating to labour, materials and transport.

" 6. Claims for the restitution of property shall be presented to the Italian Government by the Government of the country from whose territory the property was removed, it being understood that rolling stock shall be regarded as having been removed from the territory to which it originally belonged. The period during which such claims may be presented shall be six months from the coming into force of the present Treaty.

" 7. The burden of identifying the property and of proving ownership shall rest on the claimant Government, and the burden of proving that the property was not removed by force or duress shall rest on the Italian Government."

Article 75 (6), which provided that claims should be presented within six months of the coming into force of the Treaty, (ii) that much of the rolling stock had been returned to France before the signature of the Treaty, (iii) that Italy was not bound to repair such stock, (iv) that some of the vehicles had been returned under the direction of E.C.I.T.O. and were therefore outside the operation of the Treaty, (v) that most of the vehicles had been sent from France to Italy as part of normal traffic and not " under force or duress ", (vi) that Italy was not bound to refund the cost of repairs to rolling stock outside Italy. These arguments were traversed seriatim on behalf of the French Government.

Held: (i) that the claim was not out of time; (ii) and (iii) that there was an obligation to repair all stock returned to France in a state of disrepair; (iv) that the fact that some vehicles were returned to France under directions given by E.C.I.T.O. was irrelevant; (v) that the provisions of the Treaty regarding burden of proof must be followed; and (vi) that Italy must refund at least part of the cost of repairs carried out in France.

The Commission said:

[I. *Periods of Prescription.*] " By ' claims ' must be understood those relating to the restitution of property, mentioned at the beginning of Article 76 (6). In this case we are dealing not with a claim for restitution of property—the property having been returned before the coming into force of the Treaty—but with a claim for payment consequent on a restitution which is alleged to have been defective. The nature of the two actions is different. An action for restitution is a replevin (*revendication*) the right to which is created by Article 75 of the Treaty. An action for compensation in respect of a restitution which has not complied with the rules laid down by Article 75 of the Treaty is based on the general rules of international law relating to the failure to carry out obligations. The provision in Article 75 (6) of the Treaty limiting the time within which such claims must be presented cannot possibly be applied to an action of this kind. Such claims presuppose, in fact, that restitution has taken place and that might have been six months after the coming into force of the Treaty as the result of a claim properly presented before that time.

" It was pointed out on behalf of the Italian Government that in this case, not only was the restitution effected [within] six months after the coming into force of the Treaty, it was effected even before that date. It follows, then, that, logically, the term fixed in Article 75 (6) of the Treaty has nothing to do with claims for damages for incomplete restitution. If it had been the intention of the Treaty to fix a time limit for claims of that kind, it should have done so expressly, having regard to the peculiarities of such claims. It is not permissible when interpreting the Treaty to introduce into it time limits for which it does not provide or to extend to one class of actions the scope of a time limit provided for another class, the less so if the first-mentioned class consists of actions which can only arise after the expiry of that time limit.

" It is not in dispute that when the request for restitution has been made within the prescribed time, the consequences of that request are not subject to the time limit. But in this case, if there was no request for restitution, that is solely because restitution had already been effected. The right to compensation for incomplete restitution does not cease to be operative by reason of the fact that the restitution was effected spontaneously, without waiting for a request on the part of the Allied or Associated Power concerned, within six months of the coming into force of the Treaty.

" [II. *Limits of Restitution. The Duty to Return and the Duty to Repair Property Removed to Italy.*] Article 75 of the Treaty must be interpreted having regard to the Declaration of the United Nations and the French National Committee of January 5, 1943, which, moreover, is expressly referred to in para. 1 of that Article. By the said Declaration of January 5, 1943, the United Nations and the French National Committee issued ' a final warning to all concerned, and in particular to persons in neutral countries, that they intend to do their utmost to defeat the methods of dispossession practised by the Governments with whom they were at war against the countries and peoples who have been so wantonly assaulted and despoiled ', and they reserved ' all their rights to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.'

" Article 75 of the Treaty translates into effect the principles expressed in the Declaration of January 5, 1943. In paragraph 1 of that Article Italy accepts the principles of the Declaration and undertakes to return, in the shortest possible time, property removed from the territory of any of the United Nations. Paragraph 2 of the Article sets out the property which Italy is under the obligation to restore: ' all identifiable property at present in Italy which was removed by force or duress by any of the Axis Powers from the territory of any of the United Nations, irrespective of any subsequent transactions by which the present holder of any such property has secured possession '.

" The conditions of the obligation to make restitution of property still in Italy and identifiable include that of place and that of time:

the property must be in Italy and must be there ' at present ', that is to say, on the date of the coming into force of the Treaty (September 15, 1947). The *ratio* of these conditions is this: Italy would not have been able to effect the restitution of property which was in a territory not subject to her sovereignty. The same *ratio* results from the exception, or rather the complement, which paragraph 5 of the Article applies to that rule; the obligation if not to make restitution at least to take the necessary measures to effect restitution applies to certain property outside Italy at the date when the Treaty came into force, but only property held in a third country by persons subject to Italian jurisdiction. On that hypothesis, Italy has the means if not to effect restitution directly, at least to compel a person holding property to return it, since he is subject to her jurisdiction. No obligation either to return or to take the necessary measures to effect the return of property is imposed on Italy in respect of property which in September 15, 1947, was on the territory of the State from which it had been removed, since that one of the United Nations which exercises sovereignty over that territory is in a position itself to see that the owner recovered possession of the property wrongfully removed. The property must be handed back in Italy, in good order (Article 75 (3) of the Treaty). As regards property liable to restitution which is in Italy, it is within the logic of the system that Italy is to bear ' all costs in Italy relating to labour, materials and transport ' (Article 75 (3)).

" As regards the property liable to restitution which is not in Italy but is held in a third country by persons subject to Italian jurisdiction (Article 75 (5)), it does not appear clearly in what manner Italy is to assume the obligation of restoring it in good condition, or whether she is to be free from that obligation. The question has no relevance to the present case and can remain unresolved.

" What is of importance is that we must reject the contention put forward on behalf of the French Government that the secondary obligation of putting property liable to restitution into good order is not necessarily linked with the primary obligation of returning the property (or, in certain cases, taking the necessary measures to effect its return with a view to restitution), whence it results that the first of these obligations would subsist even for property already restored before September 15, 1947, and, in consequence, not susceptible of being the object of the second obligation. The link between these obligations is indeed the result of the fact that one of them is primary and the other secondary, as is conceded on behalf of the French Government. The secondary obligation cannot exist without the primary. Article 75 of the Treaty is confined to enunciating Italy's obligation to restore property which has been removed and which was on September 15, 1947, on her territory and to take the necessary measures to effect the return of such property held in any third country by persons subject to Italian jurisdiction. That such property must be restored in good condition is a modality of the obligation to return (and in certain cases to take the necessary measures to effect its return). Article 75 does not create over and above the obligation to return or take measures to effect return, a general responsibility on the part of Italy in respect of damage sustained by property while it was on Italian territory, a responsibility which would exist even for property already returned before September 15, 1947, to the territory of that one of the United Nations from which it had been removed.

" If, then, it can be shown that the locomotives of the S.N.C.F. presently in question were returned in December 1943 or January 1944 to the undertaking which owned them, Italy, according to the contention put forward on her behalf, is not bound to refund the cost of repairing them, seeing that the locomotives do not fall within the categories comprised in paragraph 2 or paragraph 3 of Article 75. On September 15, 1947, the locomotives in question, if the allegations made on behalf of Italy are correct, were not in Italy and were not held in France by persons subject to Italian jurisdiction; they were held by the S.N.C.F. to whom they had been returned without the intervention of E.C.I.T.O. . . .

" [III *Parallel Fulfilment of Obligations of Reparation under Other Instruments. The Position of E.C.I.T.O. and of Rolling Stock Returned under its Directions.*] The juridical position of the other rolling stock is different, seeing that it was returned in a damaged condition to France under the auspices of E.C.I.T.O. It is true that that rolling stock was no longer in Italy on September 15, 1947, but that was because it had been restored to the S.N.C.F. under the armistice, as the result of the somewhat provisional measures taken in emergency by E.C.I.T.O. in view of the French Railways' extremely serious deficiency of rolling stock and in view of the speed and care with which that administration could repair its own stock. It was, in fact, a matter of reducing, by a speedy return of unrepaired vehicles, the damage which the administration of the S.N.C.F. had suffered and continued to suffer while deprived of such vehicles.

" It cannot be considered that E.C.I.T.O., in ordering these measures, intended to deprive the S.N.C.F. of the rights which might arise in its favour from the Treaty by reason of the removal of its rolling stock from France, nor the corollary rights which sprang from the Declaration of London. Nor can it be considered that the S.N.C.F. in lending itself to the carrying out of these measures wished to renounce the rights in question. In the chaotic situation in which transport in Europe then was, and taking into account the extremely serious consequences which could have resulted from that situation, both for the armies of occupation and for the civil population, including the Italian, the question was not one of anticipating the conclusion of agreements on restitution and responsibility—which were reserved for the Treaty of Peace then in course of preparation; it was a question of taking, under conditions of emergency, technical measures designed to avoid the worst. The Italian railway administration could not legitimately have thought that their carrying out of what was decided by E.C.I.T.O. would have the effect of relieving Italy from obligations which the Treaty of Peace was to impose on her in consequence of the Declaration of the United Nations and the French National Committee of January 5, 1943.

" It was contended on behalf of the Italian Government that the exchange of wagons, in good condition or bad, was, before the coming into force of the Treaty, the object of a special agreement intended to resolve the problem within the framework of an autonomous, independent system in which were advantages (e.g., damaged wagons to be accepted in the condition in which they were found) and disadvantages (e.g., absence of numerical equivalence in exchanges; use beyond the frontier of Italian rolling stock, which thus became irrecoverable); that there was to this end set up an international administrative organization (of the Union type) in the midst of the European community, on a basis of equal representation, an organization which . . . was governed exclusively by its own law and by special treaties concluded between its members, a law which was not that of a relationship between conquerors and defeated, like the Treaty, and which, by its very nature, excluded the application of rules of any other juridical order; that a juridical relationship created within that special framework could not be called again in question *ad libitum* by one of the parties who wished to keep the advantages already obtained and to obtain new ones on the basis of new stipulations created after the formation of the juridical relationship in question.

" That reasoning cannot be accepted, certain of its premises being, in the opinion of the Conciliation Commission, incorrect in fact.

" Italy was not a member of E.C.I.T.O. She had acquired only the status of a co-belligerent and had not been admitted as one of the Allied and Associated Nations, of which E.C.I.T.O. was a technical body, entrusted with an urgent task relating to European transport. E.C.I.T.O. was not bound to obtain the consent of the Italian Government or of the Italian railways, but, by virtue of Article VII (8) of the Agreement of September 27, 1945, it had the power to ' arrange, as soon as practicable, to restore to any member Government transport equipment and material belonging to it or to its nationals, found outside the territories under its authority and outside its control '. . . . The regional management at Rome of E.C.I.T.O. was directed by the English General Fellows, and had the task of controlling the Italian railways. It was natural for the Italian railways to be present at the Conference called at Rome by E.C.I.T.O. on March 8, 1946, but not in order to contract obligations or to insist on rights, in their own name or that of the Italian Government, but rather to press their point of view on E.C.I.T.O. and to seek to ensure that the decisions taken by that body clearly took into account their point of view—as was done, for example, by the acceptance of the principle of quantitative exchange for damaged wagons.

" It is not, consequently, possible to speak of a free contractual discussion between the Italian railways and the S.N.C.F., or between the Italian Government and the French Government, which would constitute a contractual stipulation leading to an agreement destined to put an end, by means of reciprocal concessions, to a dispute the settlement of which was generally known to be reserved for the Treaty of Peace. Nor is it possible to speak of a dispute which would be determined by the decisions of an international administrative organization which would be binding on France and Italy. E.C.I.T.O. was a body set up by all the United Nations of Europe and by the United States, and Italy took no part in either its creation or its operation, because she was still under the régime of the armistice and because her railways were in fact controlled by E.C.I.T.O. The latter had purely technical functions, in which it acted as an intermediary; it could not anticipate the definitive provisions of the Peace Treaty. On the other hand, E.C.I.T.O. did not, in this matter, go beyond its powers when it ordered an immediate restitution of damaged rolling stock. That provisional measure, which circumstances made not merely advisable but imperative, could not govern the basic juridical problem which had already been posed by the Declaration of London.

" [IV. *The Burden of Proof as to Identifying the Property.*] The arguments in support of the French claim concerning wagons, vans and carriages can only be accepted if the other conditions required by Article 75 of the Treaty are fulfilled in respect of that rolling stock. This Article implies that the property to be returned shall be identifiable (paragraph 2). The burden of identifying the property as well as that of proving ownership falls on the claimant Government (paragraph 7). In this case, the wagons, vans and carriages were identified and the ownership thereof was recognized by Italy at the moment when she came to return them. But the number of damaged wagons which were returned is in dispute. It is for the French Government to prove the number returned.

" [V. *The Burden of Proof whether the Rolling Stock had been ' removed by force or duress '.*] The arguments in support of the French claim can be accepted only on the further assumption that the rolling stock in question was ' removed by force or duress ' from French territory (Article 75 (2) of the Treaty). It was claimed on behalf of the Italian Government that that point must be verified;

the damaged French wagons might have been in Italy not because they were taken as spoil but for reasons of normal commercial traffic, non-military in character. That could be shown by the number of Italian wagons which, at the relevant time, were in France. About 4,500 wagons were returned by France under the auspices of E.C.I.T.O., and another 4,750 were returned under various agreements concluded in Paris in 1947.

" Article 75 (6) provides that ' rolling stock shall be regarded as having been removed from the territory to which it originally belonged '. Although that presumption occurs in a paragraph which deals with the question of who is entitled to claim restitution (' Claims for the restitution of property shall be presented to the Italian Government by the Government of the country from whose territory the property was removed '), its scope is wider than that. If that were not so, it would have sufficed to add to the extract from paragraph 6 just quoted the following: ' and, as regards rolling stock, by the Government to which it originally belonged '. But the draftsman of the Treaty preferred a version which is not limited to resolving the problem of who is entitled to claim restitution in the matter of rolling stock, but which admits the presumption that that rolling stock shall be regarded as having been removed ' from the territory to which it originally belonged ' and ' removed by force or duress ' (Article 75 (2)). Without that addition, the subordinate sentence would amount to a mere statement of the obvious. The expression ' by force or duress ' was not repeated in the subordinate sentence for brevity, just as it was not repeated in the first sentence of paragraph 6, although there also, in the phrase ' the country from whose territory the property was removed ', ' by force or duress ' is necessarily implied. In any event, the presumption imposed by Article 75 (6) in connection with rolling stock is not *juris et de jure* but *juris tantum,* in view of the clear provision of the following paragraph (7) (' the burden of proving that the property was not removed by force or duress shall rest on the Italian Government '). This paragraph makes no exception for rolling stock.

" It is true that when France was defeated in the Spring of 1940 and the Armistice of Rethondes signed in June 1940, the French railways passed under the control of the German Occupant, who, during the war in Europe, used them primarily for his own war objectives. That does not, however, preclude the fact that after the armistice between France and Italy, also in June 1940, normal railway traffic was resumed between the two countries, although to a reduced extent, resulting in an exchange of wagons, carriages and merchandise which until December 31, 1943, was governed by the R.I.V. (Règlement international des wagons) and by the R.I.C. (Règlement international des voitures).

" In argument on behalf of the French Government, although it was admitted that, after the armistice, normal commercial traffic between France and Italy was resumed, it was alleged that the wagons which are the subject of the present claim left France otherwise than in the course of such traffic. According to Article 75 (7), it is for the Italian Government to prove that these wagons were not removed from French territory by force or duress.

" In any event, in order to set limits to the scope of enquiries, it is important to recall that Article 75 of the Treaty must be interpreted in the light of the Declaration of London of January 5, 1943, the principles of which Italy expressly recognized in the first paragraph of that Article. Now, the Declaration of London expressly condemns ' transactions apparently legal in form, even when they purport to be voluntarily effected '. It must be observed, on the other hand, that the number of Italian wagons found in France is not in itself decisive, seeing that Italy herself was, since the armistice of September 8, 1943, and to the extent that she was occupied by the German Army, under duress.

" [VI. *The Obligation to Carry Out Repairs in a Given Place.*] It was argued on behalf of the Italian Government that under Article 75 (3) of the Treaty it was under the obligation to do repairs and to carry them out in Italy, not to refund the cost of repairs effected by others outside Italian territory. As the result of the measures taken by E.C.I.T.O., to which the Italian Government made no opposition, objection or reservation, a situation was created which made it impossible for repairs to be carried out in Italy by the efforts of the Italian Government. The obligation imposed on the latter should, however, be discharged in accordance with the rules of good faith, which must govern the interpretation of the Treaty, by accepting the equivalent obligation of refunding, not the cost of the repairs incurred by the S.N.C.F., but the cost which the Italian Government would have incurred if the repairs had been carried out in Italy. The Italian Government must be at liberty to prove that, and to what extent, the latter costs would have been less than those which the S.N.C.F. must have incurred. The Conciliation Commission must, moreover, reserve the consideration whether the figure which will be ascertained on the basis of the foregoing should not be reduced for each occasion that the S.N.C.F. was not prepared to . . . order [the work] to be executed by Italian industry in Italy. Under Article 75 of the Treaty in fact, repairs ought to be carried out in Italy, to the consequent advantage of the Italian economy."

The Commission ordered enquiry to be made into (a) the number of French locomotives returned by Italy, and (b) whether they were returned before E.C.I.T.O. was set up and without any intervention by that body; (c) whether Italy returned them before repairing them; (d) the number of damaged wagons returned to the S.N.C.F.; (e) whether the damaged wagons, etc., returned to France had been removed from French territory otherwise than by force or duress; and (f) whether the repair of those wagons would have cost less, and if so by how much, if it had been carried out in Italy at the expense of the Italian Government.

[Report: *Recueil des Décisions*, Part 4, p. 152.]

NOTE.—The Italian member of the Commission appended a dissenting opinion.

Treaties of Peace—Performance of—Restitution and Reparations Articles—Compensation for Property which Cannot be Returned—Calculation of Sum Necessary to Purchase Similar Property—Allowance for Improvements—Treaty of Peace with Italy, 1947.

SUERMONDT & DUMONT CLAIM.

Franco-Italian Conciliation Commission. October 19, 1953.

(Bolla, Perier de Feral, Sorrentino.)

THE FACTS.—On May 24, 1940, the claimant firm, composed of two French nationals, manufacturers of metal wire making equipment, consigned wire drawing machinery to certain purchasers in South Africa, by S.S. *Edda*, from Marseilles to Durban. The *Edda* arrived at Genoa on May 27, 1940, and, the ship not having sailed before the Italian declaration of war on France, the machinery was unloaded and sequestrated by the Prefect of Genoa. After the end of hostilities, the machinery could not be found. The French Government claimed compensation for the loss, which the Italian Government admitted, but a dispute arose as to the amount payable.

The Italian Government relied on Article 78 (4) (*a*) of the Peace Treaty with Italy of 1947,[1] but contended that the basis for the calculation of the two-thirds fraction therein mentioned was the insured value of the goods rather than either the sale price as shown on the invoices or the current market price of the machines. For one thing, similar machinery available in 1950 (when the case was referred to the Commission) would have certain improvements over the lost machinery and a purchaser of the new models would be in a better position than one who bought the 1940 models in new condition. The compensation should therefore be reduced by two-thirds of the difference between the old and the new value.

Held: that these contentions must fail. The compensation must be based on the market price of the machinery, less an assessed sum for the improvements. The Commission said, in effect: The insurance figure can only be taken as the value of the goods if exact details of the consignment were not known or if the machinery was, for some reason, no longer obtainable on the market. But in the present case, full particulars of the lost property are available, similar machinery is again on the market, and its exact price is known."

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[1] Article 78 (4) (*a*) provides:

" The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals."

On the other hand, " on a true construction of Article 78 (4) (*a*) of the Treaty of Peace, if the property which it is sought to substitute is something better than the property lost (for example, as a result of technical progress made in the meantime), it is not exactly similar property within the meaning of Article 78 (4) (*a*); similarity can only be reached by deducting from the purchase price a sum corresponding to the superiority of the property purchased over the property lost.'"

The Commission considered evidence as to the improvements and modifications in the latest models as against the machinery which was lost, assessing it at 5 per cent. of the price, and continued: " It has been contended on behalf of the Italian Government that the basis for calculating the compensation should not be the present sale price of the machine, but the net cost, that is, the sale price less profit, which an expert witness has assessed at 21.9 per cent. of the sale price. Such a calculation is not, however, permissible. The Commission cannot regard such a deduction as being in conformity with either the letter or the spirit of Article 78 (4) (*a*) of the Treaty of Paris. That Article speaks of the purchase, not the manufacture, of similar property. Even if the sufferer is in a position himself to manufacture similar property, he has the right to buy it on the market, at the market price.

" Article 78 (4) (*a*) of the Peace Treaty provides, in a case where the restoration of the property is impossible, a special method of calculating compensation, and an interpreter must adhere by that; he has no right to have recourse to the generally accepted principles of calculating damage."

The Commission ordered payment of a sum equal to two-thirds of the ruling price of the machinery less 5 per cent. for improvement.

[Report: *Recueil des Décisions*, Part 4, p. 183.]

Peace Treaties—Effects of—*Postliminium*—Booty.

See p. 441 (*Gold Looted by Germany from Rome in 1943*).

Treaties—Special Kinds of—Peace Treaties—Effects of Waiver of Claims and " Save Harmless " Provision.

See p. 223 (*Neri* v. *United States*).

F—MISCELLANEOUS

Treaties—Relation to Municipal Law—Declaration of London of January 5, 1943—Whether Applicable in Preference to Municipal Law Inconsistent with its Terms.

See p. 406 (*Werner* v. *Widow Rotschild*).

PART IX

INTERNATIONAL ORGANIZATION AND ADMINISTRATION

E—INTERNATIONAL OFFICIALS

International Organizations—Officials of—Dismissal of—Reasons for Dismissal—Permanent Appointments—Inquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees.

GORDON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 21, 1953.

THE FACTS.—The complainant entered the service of the United Nations on October 7, 1946, and after holding a temporary contract received a permanent contract on August 12, 1947. At the beginning of October 1952, the complainant appeared as a witness before a United States Federal Grand Jury and on October 13 he appeared as a witness before the Internal Security Sub-Committee of the United States Senate which was investigating alleged subversive activities of United States citizens employed by the United Nations. At the Senate Sub-Committee's hearing the complainant claimed the privilege against self-incrimination embodied in the Fifth Amendment to the United States Constitution and refused to answer certain questions put to him, particularly as to whether he had ever been a member of the Communist Party, whether he was now engaged in any subversive activities against the United States Government, and whether he had ever engaged in espionage. On October 22, the Secretary-General, referring to the official transcript of the Internal Security Sub-Committee of the Committee on the Judiciary of the United States Senate, stated that he was concerned about the refusal of the complainant to answer certain questions concerning matters outside his official United Nations duties and, in particular, about his refusal to answer the question as to whether he was "now engaged in any subversive activities against the United States Government". The complainant was suspended with pay, pending investigations, with immediate effect, and on October 31 was instructed by the Director of Personnel not to enter United Nations Headquarters during the period of suspension. Meanwhile, the Secretary-General had obtained a legal opinion from a commission of jurists composed of Sir Edwin Herbert, Mr. William D. Mitchell and Mr. H. Veldekens, regarding the position of United Nations officials of United States nationality, and on December 1 communicated it to the complainant, drawing his attention to "the

Fourth Part of this report which relates to Principles with Regard to Officers Accused or Suspected of Disloyalty to the Host Country ". The Secretary-General indicated his decision to accept the recommendation of the three jurists and warned the complainant that if he failed to notify the appropriate United States authorities of his intention to withdraw the plea of privilege and to answer the pertinent questions put to him, he would be compelled to terminate his appointment. The complainant replied on December 4 that he could not agree with the Commission of jurists, and asked the Secretary-General to reconsider his decision. The Secretary-General informed the complainant, on December 5, that his attitude constituted " a fundamental breach of the obligations laid down in Staff Regulation 1 (4) " and that his appointment was terminated. Regulation 1 (4) provides as follows:

> " Members of the Secretariat shall conduct themselves at all times in a manner befitting their status as international civil servants. They shall not engage in any activity that is incompatible with the proper discharge of their duties with the United Nations. They shall avoid any action and in particular any kind of public pronouncement which may adversely reflect on their status. While they are not expected to give up their national sentiments or their political and religious convictions, they shall at all times bear in mind the reserve and tact incumbent upon them by reason of their international status."

The Secretary-General agreed to the direct reference of the case to the Administrative Tribunal without prior consideration by the Internal Joint Appeals Board. The complainant, after first requesting reinstatement, arrears of salary and damages, later amended his application, substituting for his request for reinstatement a claim for further damages, amounting to five years' salary.

The complainant's contentions were as follows:

(a) The decision to terminate his appointment was illegal and void, as it resulted from an illegal agreement between the Department of State of the United States of America and the Secretary-General to terminate, on political grounds, the appointment of United States citizens members of the Staff of the United Nations. The decision contested was the result of improper pressure exercised upon the Secretary-General by an agency of a Member State, namely, the Internal Security Sub-Committee of the Judiciary Committee of the United States Senate. Accordingly, there had been a violation of Article 100 of the Charter of the United Nations and of Staff Regulations 1 (1), 1 (3) and 1 (9). Article 100 of the Charter provides:

> " 1. In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.

2. Each member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

Regulations 1 (1), 1 (3) and 1 (9) make provision for the practical application of the principles set forth in Article 100 of the Charter.

(b) The termination of the complainant's employment was improper in that it was based on arbitrary and extraneous political considerations, particularly upon the supposition that the complainant had or was suspected of having Communist political affiliations, which were regarded with disfavour and opposed by United States governmental agencies.

(c) The termination of the complainant's appointment violated the basic rights to tenure of appointment of the complainant, who held a permanent appointment, since it was not effected in accordance with the relevant provisions of the Staff Regulations. According to Staff Regulations 9 (1) and 10 (2), relied upon by the complainant, holders of permanent appointments can only be discharged in case of reduction of staff, unsatisfactory services or impaired health, or summarily dismissed in case of serious misconduct, respectively.

(d) The invocation of the privilege against self-incrimination under the Fifth Amendment to the Constitution of the United States did not constitute a breach of the Staff Regulations, and particularly of Regulation 1 (4), since under American law the exercise of the privilege did not create an inference of guilt. American officials of the United Nations had not agreed as a condition of their employment to surrender their rights under the Constitution of the United States.

(e) The Secretary-General violated principles of due process in placing the complainant upon special leave with pay and in failing to consult the joint bodies.

The following contentions were advanced on behalf of the Secretary-General:

(a) The Secretary-General merely confined himself to receiving information on officials under the agreement made with the Department of State of the United States and at no time did he surrender his power of decision with respect to the retention or appointment of staff.

(b) The complainant had a duty under the Charter and under Staff Regulation 1 (4) to conduct himself at all times in a manner befitting his status as an international civil servant and to remain worthy of trust and confidence.

(c) The refusal to answer questions by claiming privilege under the Fifth Amendment, while lawful according to American law, gave rise to the inference that the complainant was or had been engaged in activities directed towards the violent overthrow of the Government of a Member State. His claim of privilege constituted a public pronouncement which reflected adversely upon his status as an international civil servant and rendered him unworthy of trust and confidence.

(d) The complainant was thus guilty of serious misconduct and his services were shown to be unsatisfactory. His appointment could, therefore, be terminated under the terms of Staff Regulations 9 (1) (*a*) and 10 (2).

(e) The Secretary-General observed principles of due process since he gave the complainant the opportunity to revoke his decision and to answer the questions put to him by the Senate Sub-Committee. Before taking the decision to terminate his appointment the Secretary-General consulted a group of senior Secretariat officials, to whom the complainant's letter of refusal was referred.

Held: (1) As to the validity of an alleged agreement between the Secretary-General and a Member State concerning the transmission of information pertaining to officials, that the Tribunal was not competent. The Tribunal used terms identical with those of its decision on the same point in the *Kaplan* case (see *infra,* p. 506).

(2) As to the termination of the complainant's appointment: (i) Permanent appointments must be terminated in accordance with the Staff Regulations; (ii) invoking the Fifth Amendment did not constitute either unsatisfactory services or serious misconduct within the meaning of the Staff Regulations; and (iii) the termination of the complainant's appointment was illegal.

The Tribunal said: ". . . The Tribunal notes that the applicant held a permanent appointment. This type of appointment has been used from the inception of the Secretariat to ensure the stability of the international civil service and to create a genuine body of international civil servants freely selected by the Secretary-General. In accordance with the regulations established by the General Assembly, permanent appointments cannot be terminated except under staff regulations which enumerate precisely the reasons for and the conditions governing the termination of service.

" The Secretary-General thus can act only under a provision of the Staff Regulations. He must indicate the provision upon which he proposes to rely, and must conform with the conditions and procedures laid down in the Staff Regulations. If he fails to comply with these principles, the Tribunal is entitled to inquire whether the termination of employment is in accordance with the rules in force.

" The applicant held a permanent contract, and his professional ability and devotion to duty have not been disputed. The termination of his employment was decided upon by the Secretary-General following the report of the Commission of three jurists which he consulted. In his letter of December 1, 1952, to the applicant, the Secretary-General wrote:

'I have decided to accept the recommendation of the Commission regarding the attitude the Secretary-General should take towards an officer who pleads some constitutional privilege against answering questions on the grounds that answers might incriminate him with regard to activities involving disloyalty to the United States. This recommendation was to the effect that a person who has refused to answer questions whether he is or has been engaged in espionage or other subversive activities in the United States, or whether he is or has at any time been a member of the Communist Party in the United States, or of some other organisation declared to be a subversive organisation, is unsuitable for continued employment by the United Nations in the United States and that his employment in the United Nations should not be continued.'

"The decision to terminate the Applicant's employment rests on the recommendation of the three jurists and states that the refusal to answer the questions 'constitutes a fundamental breach of the obligations laid down in Staff Regulation 1 (4), and that you [the applicant] are unsuitable for continued employment in the Secretariat'.

"The three jurists sought a legal basis for the termination of the appointment of staff members pleading privilege under the Fifth Amendment. They started from the concept that 'the rights of the staff in matters of their employment are contractual and that the terms of the contract are to be found in the Staff Regulations and the rules promulgated as Staff Rules in pursuance of the Regulations'. They then propounded a general theory for dealing with breaches of the obligations laid down in the Staff Regulations and for termination indemnities:

"A fundamental breach by a staff member of his obligations laid down in Articles 1 (4) and 1 (8) is intended to be dealt with by the Secretary-General on his own responsibility, although in many cases such a fundamental breach would also be serious misconduct under Article 10. We think also that the provisions with regard to termination indemnity contained in Annex III to the Regulations apply only in cases arising under Article 9 (1) and not in cases of fundamental breaches of Articles 1 (4) or 1 (8) or in the case of dismissal under Article 10."

The jurists added:

'It will be observed that, in our opinion, it would be necessary to rely upon the Secretary-General's inherent right to terminate a contract for fundamental breach under Article 1 (4) or Article 1 (8) only in cases of officers holding permanent or fixed term appointments whose actions could not be said to constitute serious misconduct under Article 10.'

"Thus, the three jurists reached the conclusion that the Secretary-General had the right to terminate appointments without indemnity, in addition to the cases provided for in the Staff Regulations. In actual fact, no provision concerning the termination of employment was cited in this case, and the applicant received an indemnity in accordance with Annex III of the Staff Regulations. Thus the decision reached in respect of the termination of the applicant's appointment did not correspond exactly with the recommendations of the jurists.

" The Tribunal notes that the opinion of the three jurists—according to which the Secretary-General can go beyond the provisions of a definite article of the Staff Regulations and terminate an appointment because of the contractual relationship between a staff member and the Secretary-General—disregards the nature of permanent contracts and the character of the regulations governing termination of employment laid down by the General Assembly under Article 101 of the Charter.

" When before the Tribunal, however, the respondent did not advance these arguments of the jurists. He held that the breach of Article 1 (4) could be dealt with both under Article 9 (1) and under Article 10 and treated as both unsatisfactory service and serious misconduct enabling the Secretary-General to dismiss the applicant without imposing disciplinary measures. In the latter case, according to the respondent, it was not for the applicant to protest against the *ex gratia* payment of an indemnity.

" The Tribunal has therefore to inquire whether any one provision of the Staff Regulations was applicable to the case of the applicant. Article 9 (1) provides for termination of employment for unsatisfactory services. Article 10 deals with misconduct and authorizes summary dismissal for serious misconduct. The scope of the term ' unsatisfactory services ' is to be determined by examination of the meaning given to the word ' services ' in the Staff Regulations and Rules. It appears clearly that the word ' services ' is used in the Staff Regulations and Rules solely to designate professional behaviour within the Organization, and not to cover all the obligations incumbent upon a staff member. If it is admitted that the invoking of a constitutional privilege in respect of acts outside a staff member's professional duties constitutes a breach of Article 1 (4) of the Staff Regulations, this fact cannot be considered as unsatisfactory services and cannot fall within the purview of Article 9 (1). On the other hand, misconduct punishable under Article 10 could also be either misconduct committed in the exercise of a staff member's professional duties or acts committed outside his professional activities but prohibited by provisions creating general obligations for staff members. This view is confirmed by the fact that, during the discussions in the Fifth Committee [of the General Assembly] on the revision of the Staff Regulations, the question of dealing with obligations deriving from Article 1 (4) was raised and no objection was made to the statement by the Chairman of the Fifth Committee that they were dealt with under disciplinary provisions.

" The Tribunal is thus called upon to consider whether the allegations made against the applicant constituted serious misconduct justifying his summary dismissal by the Secretary-General without reference to the Joint Disciplinary Committee. The conception of serious misconduct enabling the Secretary-General to impose summary dismissal without disciplinary procedure was introduced at the revision of the Staff Regulations to deal with acts obviously incompatible with continued membership of the staff. Except in cases of agreement between the person concerned and the administration, the disciplinary procedure should be dispensed with only in those cases where the misconduct is patent and where the interest of the service requires immediate and final dismissal. In the present case, the applicant invoked the privilege provided in the Constitution of his country. This step did not give rise to subsequent legal proceedings against the applicant. This provision of the Constitution may be properly invoked in various situations which, because of the complexity of the case law, cannot be summarized in a simple formula. The legal situation arising from recourse to the Fifth Amendment was so obscure to the Secretary-General himself that he considered it desirable to seek clarification from a commission of jurists. Their conclusions were later discussed by the General Assembly, who reached no decision. Subsequently, these conclusions were partially set aside by the Secretary-General himself.

" The nature of serious misconduct appeared so disputable to the Secretary-General that he granted termination indemnities, which are expressly forbidden by the Staff Regulations (Annex III) in cases of summary dismissal. Whatever view may be held as to the conduct of the applicant, that conduct could not be described as serious misconduct, which alone under Article 10 (2) of the Staff Regulations and the pertinent Rules justifies the Secretary-General in dismissing a staff member summarily without the safeguard afforded by the disciplinary procedure.

" In these circumstances, the decision to terminate the applicant's employment, since it is not shown to be based upon the provisions of the Staff Regulations and Rules, must be declared illegal."

The Tribunal awarded the complainant full salary up to the date of the judgment and a sum of 6,000 dollars in lieu of reinstatement.

[Report: Judgment No. 29, U.N.Doc. AT/DEC/29.]

NOTE.—(1) In connection with loyalty investigations carried out by United States Congressional Committees and Federal Grand Juries, see *Crawford* v. *Secretary-General of the United Nations* (*infra*, p. 501).

(2) In connection with the termination of temporary contracts in similar circumstances, see *Kaplan* v. *Secretary-General of the United Nations* (*infra*, p. 506).

(3) Similar decisions were handed down on the same day in the cases of *Harris* ($40,000 compensation), *Glassman* ($20,000 compensation), *Older* ($27,500 compensation), *Bancroft* ($12,000 compensation) and *Elveson* ($7,000 compensation). In the cases of *Svenchansky* and *Eldridge*,

the Tribunal ordered the reinstatement of the complainants, but the Secretary-General " decided that it would be inadvisable, from the points of view which it was his duty to take into consideration, to reinstate " the complainants. The Tribunal, therefore, by decisions of October 13, 1953 (unreported) awarded them compensation for the injury sustained in accordance with Article 9 of the Statute of the Tribunal, which provides for such compensation where the Secretary-General decides that compensation is, in the interests of the United Nations, preferable to the rescinding of the decision contested or the specific performance of the obligation invoked. Svenchansky and Eldrige were awarded $20,000 and $16,000 respectively, in lieu of reinstatement.

(4) In the *Reed* case, the Tribunal awarded 10,000 dollars damages to cover the period from the date of judgment until the date on which the complainant would normally have retired on pension (somewhat less than two years), and further ordered that the complainant be paid in every 12 months thereafter until her death such amount as the complainant would normally have been entitled to expect as annual pension. If the complainant and the Secretary-General mutually so agreed, the amount of the annual pension could be replaced by a lump-sum payment computed by actuaries as adequate compensation for the surrender of those rights to pension from the date of retirement to death. In making the necessary calculations to determine the amount of the lump sum, the Secretary-General called on the assistance of the Secretariat of the United Nations Joint Staff Pensions Fund, which informed him that the complainant had discovered, when she was asked to submit a birth certificate for the Fund's records, after the termination of her appointment, that she was born one year earlier than she had stated. The Secretary-General drew the Tribunal's attention to the fact that the complainant's age had been stated inaccurately by both parties, and asked the Tribunal whether, in those circumstances, it might " consider to correct its judgment so as to provide for a reduction of the damages awarded to Miss Reed by at least two-thirds of the amount thereof ". In a decision of December 11, 1953, the Tribunal declined to examine the request for a general reconsideration of the question of remedial relief which the complainant had put forward in the event that the Tribunal should decide to re-examine its earlier judgment, and ordered that the amount of compensation which was specifically related to age and date of birth be amended by substituting the sum of 3,500 dollars for the sum of 10,000 dollars. On the question of amending an earlier judgment, the Tribunal said: ". . . whereas it is now clear that the wrong date of birth and statement as to age was submitted to the Tribunal by both parties, so that the Tribunal had no opportunity of being made aware of the true facts prior to proceeding to Judgment No. 37 on August 21, 1953, the Tribunal has no option but to consider correcting the judgment in the light of the accurate facts now belatedly produced . . . Article 10 of the Statute of the Tribunal states that its judgments are final . . . The Tribunal is entitled to rectify figures computed on the basis of a date submitted by both parties and recognized by both after the judgment as erroneous." [Judgment in correction of material error in Judgment No. 37, U.N.Doc. AT/DEC/51.]

(5) The Secretary-General of the United Nations submitted to the Eighth Session of the General Assembly a request for a supplementary appropriation of 179,420 dollars for the purpose of covering the awards

made by the Tribunal in the above cases and in the related *Crawford* and *Glaser* cases (see *infra* and p. 513, respectively). This bequest was discussed at length by the competent Committees of the General Assembly. As certain delegations opposed the payment of the awards on grounds of principle, the Assembly submitted the following questions to the International Court of Justice for an Advisory Opinion:

> " (1) Having regard to the Statute of the United Nations Administrative Tribunal and to any other relevant instruments and to the relevant records, has the General Assembly the right on any grounds to refuse to give effect to an award of compensation made by that Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his assent ?
> " (2) If the answer given by the Court to question (1) is in the affirmative, what are the principal grounds upon which the General Assembly could lawfully exercise such a right ?"

The Court in its Advisory Opinion of July 13, 1954, on *The Effect of Awards of Compensation made by the United Nations Administrative Tribunal,* replied in the negative (see *I.C.J. Reports,* 1954).

International Organizations—Officials of—Dismissal of—Reasons for Dismissal—Use of Discretionary Powers—Enquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees—Membership of Political Parties.

CRAWFORD *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 21, 1953.

THE FACTS.—The complainant entered the service of the United Nations in 1947 and was granted a temporary appointment, later termed " temporary indefinite ", as Information Officer in the United Nations Children's Emergency Fund. On October 15, 1952, the complainant, who was a citizen of the United States of America, appeared before the Internal Security Sub-Committee of the United States Senate as a witness in an investigation into the alleged subversive activities of United States citizens employed by the United Nations. At the Sub-Committee's public hearings, she refused to answer three questions put to her, pleading privilege against self-incrimination under the Fifth Amendment to the United States Constitution. On October 16, 1952, the complainant submitted her resignation by telegram to the Executive Director of the Children's Emergency Fund. No acknowledgment or reply to this telegram was received by her, and she later withdrew her resignation by letter dated December 6, 1952.

In a letter dated January 7, 1953, the Secretary-General notified the complainant that under the powers conferred upon him by Staff Regulation 9 (1) (*c*), which provides that the Secretary-General may at any time terminate an appointment if, in his opinion, such action would be in the interests of the United Nations, he had decided to terminate her appointment with effect from February 8, 1953. By letter of January 23, 1953, the complainant protested against the Secretary-General's decision and requested that her case be submitted directly to the Administrative Tribunal. The Secretary-General replied by letter of January 27, 1953, that he agreed to refer the case to the Tribunal without previous consideration by the internal Joint Appeals Board, in accordance with Article 7 of the Statute of the Tribunal. On February 11, 1953, the Acting Director of Personnel informed the complainant that if she wished to fill in the necessary forms, the Personnel Office would transmit them to the United States Government as forms of an applicant the Personnel Office might be considering for employment. These forms were meant to serve as a basis for an inquiry, by the United States authorities, into loyalty towards the United States constitutional system, to which prospective American officials of international organizations were subject.

The complainant replied that she had informed the United States Government more than a dozen years ago that she had been in the past a member of the Communist Party, that after she gave that information she had been employed by the United States Government and that as recently as the summer of 1952 she had been the subject of an investigation by representatives of the United States Federal Bureau of Investigation (F.B.I.) in several places in which she had previously resided. Since she felt that the United States Government, and more particularly the F.B.I., already had the most complete possible information about her, she was dubious about the advantage of any investigation. On February 17, 1953, the complainant requested the Administrative Tribunal to order her reinstatement in her former post.

The complainant contended, first, that the Staff Regulations, as amended by the General Assembly of the United Nations at its Sixth Session in order to empower the Secretary-General to terminate appointments in the interests of the organization, did not modify the legal principles applicable to officials holding temporary indefinite appointments, as laid down by the Administrative Tribunal in its Judgment No. 4. It followed that the Secretary-General, in terminating the complainant's appointment without stating the reason, committed an infringement of Staff Rule 9 (1) (*c*) interpreted in the light of the Tribunal's decision that the Secretary-General was not entitled to withhold the specific reasons for the termination of a temporary appointment. The complainant further contended that the termination of her appointment was effected by the Secretary-General "on the basis of fear of what the United States Government might say", and constituted a breach of Article 100 of the Charter of the United Nations, which provides that each

Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities. It was also not in accordance with the spirit of Article 101, which provides that the staff of the United Nations shall be appointed by the Secretary-General under regulations established by the General Assembly.

The complainant finally contended that her conduct and services having been satisfactory, it must be concluded that the Secretary-General had based his decision on the grounds that (i) the complainant refused to answer certain questions before the Internal Security Sub-Committee of the United States Senate, pleading privilege under the Fifth Amendment; or (ii) that she expressed sympathy for certain organizations; or (iii) that she belonged to the Communist Party in 1935; or (iv) that she was at present a member of the Progressive Party; and that termination of employment on any of these grounds conflicted with the provisions of the Charter, the Staff Regulations, the Staff Rules and the Universal Declaration of Human Rights.

On the other hand, it was contended that the Secretary-General was not required, under Staff Regulation 9 (1) (*c*), to give reasons for the termination of temporary-indefinite appointments, that termination was not decided upon the grounds of the applicant's political beliefs, and that one of the reasons for the Secretary-General's decision was that the complainant had pleaded privilege before the Senate Sub-Committee under the Fifth Amendment. By so doing, the complainant had infringed the provisions of Staff Regulation 1 (4), which requires of United Nations officials the reserve and tact incumbent upon them by reason of their international status.

Held: (1) that the discretionary powers vested in the Secretary-General in respect of the termination of temporary appointments could not be exercised without proper motive; and (2) that membership of any particular political party did not, in itself, constitute a justification, in the absence of other cause, for dismissal.

The Tribunal said: ". . . Article 9 (1) (*c*) of the Staff Regulations provides that the Secretary-General may terminate temporary appointments, if in his opinion such action would be in the interest of the United Nations. The discussions in the Fifth Committee show that the intention of the authors of this provision, approved by the General Assembly's Resolution 590 (VI) on February 2, 1952, was to invest the Secretary-General with discretionary powers in the termination of temporary appointments. The Tribunal, however, finds that such discretionary powers must not be exercised without proper motive so that there should be no misuse of power, since any such misuse of power would call for the revoking of the decision. In this case, the applicant's appointment was terminated through the Secretary-General's letter of January 7, 1953, in which the applicant was told that the Secretary-General acting under the authority granted to him by Article 9 (1) of the Staff Regulations had decided not to continue the applicant's employment with the Secretariat. The more specific reason why the Secretary-General thus made use of Article 9 (1) (*c*) was not stated at the time of the termination of the applicant's appointment. During the proceedings before the Tribunal, the respondent gave no other indication of the reason than letting it be understood that at least one reason was the applicant's invoking of the privilege of the Fifth Amendment before the Internal Security Sub-Committee of the United States Senate on October 15, 1952. The Tribunal has made a careful study of the pertinent facts and in particular has perused the documents contained in the applicant's personnel file. The Tribunal is convinced that the decision to terminate the applicant's appointment was taken only because of the circumstances relating to her appearance before the Sub-Committee on October 15, 1952. The Tribunal is fortified in this opinion by the fact that the Secretary-General was so insecure in his own views that on February 11, 1953, he voluntarily caused her to be invited to complete forms with a view to submission to the United States Government as if she were a fresh applicant for employment with the United Nations. The Tribunal reaches the conclusion that this indicated that the Secretary-General, in the light of later information, realised that his original decision to terminate [the appointment of] the applicant was not sufficiently considered, being open to the suggestion of misuse of power. There was only one issue on which the applicant had refused information in the proceedings of the Sub-Committee. Of the three answers refused in the public proceedings, the applicant had given adequate answer to two questions in executive session, leaving only one question unanswered. This question was as to who in 1935 had asked her to join the Communist Party. The applicant had already refused to furnish the names of those who were in the Party with her, in the course of her affidavit to the F.B.I. in 1939 prior to her eight years' service in the United States Government. It is not clear to the Tribunal in what way the services of any staff member can be of less value in her employment with the United Nations by reason of declining to name some one person who invited her, many years before the creation of the United Nations, to join the Communist Party, a membership which she had terminated within just over one year, particularly in the light of the fact that her previous refusal to give such information to the F.B.I. had not precluded her employment by the United States Government. Moreover, in his statement to the Tribunal on March 20, 1953, the respondent was at pains to point out that the pleading of the privilege of the Fifth Amendment was quite unnecessary because the person who recruited her for her membership of one year in the Communist Party did so in 1935 and any crime on which these matters could reasonably bear could not be prosecuted after the lapse of three years. The respondent went on to point out that this is the usual statute of limitations applicable to federal crimes, quoting in support 8 Wigmore on Evidence, 3rd ed., section 2279, to the effect that once the statute of limitations has run, the privilege no longer applies. In the view of the Tribunal, this was a further reason for the decision of the Secretary-General to seek on February 11, 1953, an arrangement with the applicant whereby she would accept the dismissal and not submit her appeal to this Tribunal but instead would re-apply for employment with the United Nations."

The Tribunal ordered the reinstatement of the complainant, and awarded her full salary from the date of termination of employment to the date of reinstatement. The Secretary-General, having decided that it would be inadvisable to reinstate the complainant, the Tribunal awarded her, by further decision of October 13, 1953, compensation in the amount of 4,730 dollars, plus salary up to the date of the judgment.

[Report: Judgment No. 18, U.N.Doc. AT/DEC/18.]

Note.—(1) The loyalty of United States citizens towards the constitutional system of government of the country has been the subject of investigation carried out prior to their appointment as Government officials, in accordance with the Hatch Act of August 2, 1939 (53 Stat. 1148, 5 U.S.C. Sec. 118j.) and the President's Executive Order of March 21, 1947 (No. 9835, 12 FR 1935). The adoption of the McCarran Act (Internal Security Act, 1950, 59 Stat. 669-673), which defines what is to be regarded as subversive activities, has contributed to broadening the scope of loyalty investigations by specialized bodies of the Executive, such as the Federal Bureau of Investigation, and to promoting investigations by the Judiciary and the Legislature (in the exercise of its constitutional right of inquiry) concerning the loyalty of citizens other than Government officials. Both Federal Grand Juries and Congressional Committees and Sub-Committees have carried out investigations into the alleged subversive activities of United States citizens serving as officials of the United Nations. In this case, the complainant was called upon to appear as a witness before the Internal Security Sub-Committee of the United States Senate. While the Sub-Committee did not exercise functions properly belonging to the Judiciary and merely carried out an inquiry for the information of Congress, refusal to appear as a witness or to answer questions might constitute contempt of Congress.

(2) The President's Executive Order of January 9, 1953 (No. 10422, amended by Executive Order of June 2, 1953, No. 10459) establishes a permanent procedure for the investigation of subversive activities on the part of United States citizens serving as officials of the United Nations or applying for appointment with the United Nations, and for the communication of the result of such investigations to the Secretary-General of the United Nations. It is for the purpose of such investigation that

the complainant was invited to fill in forms to be transmitted to the United States Government.

(3) For Judgment No. 4, relied upon by the complainant regarding the Secretary-General's obligation to state the specific reasons for the termination of temporary appointments, see *Howrani et Al.* v. *Secretary-General of the United Nations* (*International Law Reports*, 1951, p. 452).

International Organizations—Officials of—Dismissal of—Reasons for Dismissal—Use of Discretionary Powers—Enquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees—Acquired Rights.

KAPLAN *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 21, 1953.

THE FACTS.—The complainant entered the service of the United Nations on February 2, 1948, and after serving on a fixed-term contract was on May 1, 1948, granted a temporary-indefinite contract. On March 27, 1952, the complainant appeared before a United States Federal Grand Jury investigating alleged subversive activities on the part of United States citizens. On April 17, the complainant was notified by the head of his Department that the Secretary-General had decided to terminate his appointment under the terms of Regulation 9 (1) (*c*), which empowered the Secretary-General to terminate appointments if it appeared in his view to be in the interest of the United Nations, with the possible alternative of resignation with payment of indemnity. On April 28, the Bureau of Personnel formally notified the complainant that his appointment would be terminated on May 29. On May 7, the complainant requested the Secretary-General to state the reasons for the termination of his appointment. The Secretary-General replied on May 14, affirming his authority to terminate temporary appointments in the interest of the United Nations and stating that the termination of the appointment was not related to any allegations which might have been made against the complainant. On May 28, the complainant requested the Secretary-General to reconsider the decision to terminate his appointment and, in view of the refusal with which he met, filed an appeal with the internal Joint Appeals Board. After considering the Report of the Appeals Board, the Secretary-General notified the complainant on October 20 that he confirmed his original decision. This was the decision referred to the Administrative Tribunal, the complainant seeking the rescission of that decision and his reinstatement in his former post.

The complainant contended, first, that the termination of his appointment resulted from pressure exercised upon the Secretary-General by the United States Senate Internal Security Sub-Committee and by the Department of State of the United States, in violation of the Charter of the United Nations and the Staff Regulations. The termination of the complainant's appointment violated his right to independent political convictions guaranteed by the Staff Regulations, and infringed the rights laid down in the Universal Declaration of Human Rights. Further, the Secretary-General violated recognized standards of due process in withholding specific reasons for the termination of the complainant's appointment. It was also contended that Staff Regulation 9 (1) (*c*) did not grant absolute discretion to the Secretary-General in terminating temporary-indefinite contracts as such an interpretation would conflict with the general intention of the entire body of Staff Regulations. Finally, whatever interpretation was placed upon Regulation 9 (1) (*c*), the complainant claimed that, under Staff Regulation 12 (1), which provided for the preservation of acquired rights, he was entitled to benefit from the legal position existing prior to the adoption of Regulation 9 (1) (*c*) and, furthermore, that he must be informed of the exact reason for the termination of his appointment and be allowed full recourse to all means of appeal.

It was contended on behalf of the Secretary-General that the Secretary-General was entitled to receive information from the Governments of Member States concerning individual officials of the United Nations. The Secretary-General denied that matters of opinion or belief were the cause of the termination of the complainant's appointment. The Secretary-General was not required to give specific reasons for terminating temporary-indefinite appointments under the terms of Regulation 9 (1) (*c*). The question of acquired rights did not arise in connection with the amendments to the Regulations. Finally, the Secretary-General asserted that there was no evidence that he had acted from prejudice or for unlawful purposes.

Held: (1) As to the validity of an alleged agreement between the Secretary-General and a Member State concerning the transmission of information pertaining to officials, that the Tribunal was not competent. The Tribunal said: ". . . Under the terms of its statute, the Tribunal is not competent to pass judgment on the validity, in relation to the Charter, of an agreement made between the Secretary-General and a Member State, whatever influence this agreement might actually have had on the decision taken in respect of the applicant. It is part of the Tribunal's function, however, to consider whether the termination of the applicant's employment is in conformity with the provisions of the Staff Regulations and the Staff Rules."

(2) As to the complainant's acquired right to the legal position enjoyed by him prior to the adoption of Regulation 9 (1) (*c*): that acquired rights cannot be invoked against a general rule of a statutory character and subject to amendment by the General Assembly of the United Nations.

The Tribunal said: ". . . The applicant contends that when he entered the service of the United Nations, the Staff Regulations then in force did not permit the Secretary-General to terminate a temporary appointment without stating the reasons therefor. He also contends that those Staff Regulations continue to apply to him, although they have been changed by the General Assembly, because he enjoys the benefit of an 'acquired right' in this connection. He further submits that relations between the United Nations and its staff are contractual in nature and consequently the two parties are bound by the contract and neither party may change its provisions without the consent of the other. He points out, in addition, that Regulation 28 of the former Staff Regulations states that 'These regulations may be supplemented or amended by the General Assembly, without prejudice to the acquired rights of members of the staff'; and that this provision was reproduced in Regulation 12 (1) of the new Staff Regulations.

"The Tribunal considers that relations between staff members and the United Nations involve various elements and are consequently not solely contractual in nature. Article 101 of the Charter gives the General Assembly the right to establish regulations for the appointment of the staff, and consequently the right to change them. The General Assembly under that Article established new Staff Regulations and decided that these new Staff Regulations should become effective on March 1, 1952, and supersede all previous Staff Regulations. It follows from the foregoing that, notwithstanding the existence of contracts between the United Nations and staff members, the legal regulations governing the staff are established by the General Assembly of the United Nations. In determining the legal position of staff members a distinction should be made between contractual and statutory elements: all matters being contractual which affect the personal status of each staff member, *e.g.*, the nature of his contract, salary, grade; all matters being statutory which affect in general the organization of the International Civil Service, and the need for its proper functioning, *e.g.*, general rules that have no personal reference. While the contractual elements cannot be changed without the agreement of the two parties, the statutory elements, on the other hand, may always be changed at any time through regulations established by the General Assembly, and these changes are binding on staff members. The Tribunal interprets the provision of Regulation 28 of the Provisional Staff Regulations and Article XII of the new Regulations in this manner. With regard to the case under consideration, the Tribunal decides that a statutory element is involved and that in fact the question of the termination of temporary appointments is one of a general rule subject to amendment by the General Assembly and against which acquired rights cannot be invoked."

(3) As to the exercise of the discretionary powers vested in the

Secretary-General in respect of the termination of temporary appointments, the Tribunal held that such powers must be exercised without improper motive, that no evidence had established improper motivation, and that the claim must be dismissed.

The Tribunal said: ". . . The applicant states that he showed outstanding professional ability during his service in the Department of Economic Affairs of the United Nations, and that his appointment was terminated consequent upon his appearance before the Grand Jury and the inclusion of his name on the list of persons as to whom the State Department had made adverse comments. The respondent states that in this case he invoked the provisions of Article 9 (1) (*c*) in terminating the applicant's appointment; that in so doing without stating the reason he took a decision which, in his opinion, was in the interest of the United Nations; that his conception of the interest of the United Nations was not subject to review by the Tribunal; that, above all, no proof had been submitted that his decision had been based on improper grounds; and that in those circumstances his decision could not be called in question or rescinded by the Tribunal. The discussions in the Fifth Committee [of the General Assembly, which deals with administrative and financial questions] show that the intention of the authors of the United Nations Staff Regulations, approved by General Assembly Resolution 590 (VI) on February 2, 1952, was to invest the Secretary-General with discretionary powers in the termination of temporary appointments. Article 9 (1) (*c*) provides that the Secretary-General may terminate temporary appointments if, in his opinion, such action would be in the interest of the United Nations. Such discretionary powers must be exercised without improper motive so that there shall be no misuse of powers, since any such misuse of power would call for the rescinding of the decision. With regard to the case under consideration, no evidence has been adduced establishing improper motivation, and the Tribunal accordingly rejects the claim."

[Report: Judgment No. 19, U.N.Doc. AT/DEC/19.]

NOTE.—(1) With respect to the appearance of United States citizens employed by the United Nations as witnesses before United States Federal Grand Juries or Congressional Committees see *Crawford* v. *Secretary-General of the United Nations* (*supra*, p. 501).

(2) With respect to the communication of information by Member States to the Secretary-General of the United Nations concerning officials of the Organisation, see *Crawford* v. *Secretary-General of the United Nations* (*supra*, p. 501).

(3) Identical decisions were handed down on the same day in the cases of *Middleton*, *Kagen-Posner*, *Sokolow*, *Van Tassel* and *Herman Zap*.

(4) In the *Rubin* case, also decided on the same day, the circumstances were somewhat different in that the Tribunal found that there was no evidence that the complainant took any part in political activities of any

kind, that he was not called before a Grand Jury or the Internal Security Sub-Committee of the United States Senate and had not been the subject of adverse comments by the State Department. The complainant, in fact, did not allege that his appointment was terminated for reasons of a political nature, but contended that his professional services had always given satisfaction and questioned the right of the Secretary-General to terminate his appointment without cause assigned or ascertainable, relying on the same interpretation of Rule 9 (1) (*c*) as Kaplan. The Tribunal came to the same conclusion as in the *Kaplan* case, for the same reasons. The decision of the same date in the *Saperstein* case is identical.

International Organizations—Officials of—Dismissal of—Reasons for Dismissal—Use of Discretionary Powers—Enquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees—Professional Competence.

MARJORIE ZAP *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 21, 1953.

THE FACTS.—The complainant entered the service of the United Nations on May 5, 1947, when she was appointed on a temporary (later temporary-indefinite) contract. On October 14, 1952, the complainant appeared as a witness before the Internal Security Sub-Committee of the United States Senate, which was investigating alleged subversive activities of United States citizens employed by the United Nations. At the hearings of the Senate Sub-Committee, the complainant invoked the privilege against self-incrimination embodied in the Fifth Amendment to the Constitution of the United States, and refused to reply to certain questions put to her. On October 16, the Director of the Bureau of Personnel notified the complainant of the termination of her appointment on the basis of a recommendation of the Walters Selection Committee. (The function of this Committee, composed of senior officials of the United Nations and presided over by an independent chairman, Mr. F. P. Walters (formerly Deputy Secretary-General of the League of Nations), was to review the position of United Nations officials holding temporary-indefinite contracts and, having regard to their professional competence, to recommend either the grant of a permanent appointment or the termination of their appointment.) The complainant, with the agreement of the Secretary-General, thereupon referred her case to the Administrative Tribunal, and claimed reinstatement.

The complainant contended, first, that the termination of her appointment resulted from pressure exercised upon the Secretary-General by the United States Senate Sub-Committee and the Department of State in violation of the Charter and the Staff Regulations, and that the termination of her appointment violated her right to independent political convictions guaranteed to the staff by the Staff Regulations and the Universal Declaration of Human Rights. Further, Staff Regulation 9 (1) (*c*) did not grant absolute discretion to the Secretary-General in terminating temporary-indefinite contracts, as such an interpretation would conflict with the intention of the Staff Regulations. In addition, the Secretary-General wrongfully based his decision to terminate the complainant's appointment on the findings of the Selection Committee, and violated recognized standards of due process. Finally, the Secretary-General displayed prejudice against the complainant on account of her activities as an officer of the Staff Association and thereby violated her right of association in contravention of Staff Regulation 8 (1).

It was contended on behalf of the Secretary-General, first, that he was entitled to receive communications from the Governments of Member States concerning officials of the United Nations. The Secretary-General denied that matters of opinion or belief were the cause of the termination of the complainant's appointment. On the contrary, the termination of the complainant's appointment was properly based on the recommendation of the Walters Selection Committee, which was made at a date prior to the complainant's appearance before the Internal Security Sub-Committee of the United States Senate. Furthermore, there was no denial of the right of association, since the Secretary-General furnished a valid reason for termination. Finally, the Secretary-General asserted that no evidence was adduced that he had acted from prejudice or for unlawful purposes. In the alternative, invocation of the constitutional privilege by the complainant would in any case have justified termination of her appointment.

Held: (1) As to the validity of an alleged agreement between the Secretary-General and a Member State concerning the transmission of information pertaining to officials: that the Tribunal was not competent. The Tribunal used terms identical with those of its decision on the same point in the *Kaplan* case.[1]

(2) As to the exercise of the discretionary powers vested in the Secretary-General in respect of the termination of temporary appointments: that such powers must be exercised without improper motive; that the grounds alleged for termination appeared to justify such termination; that no evidence had been adduced establishing improper motivation; and that the claim must therefore be dismissed.

The Tribunal said: " . . . The discussions in the Fifth Committee [of the General Assembly] show that the intention of the authors of the United Nations Staff Regulations, approved by General Assembly Resolution 590 (VI) on February 2, 1952, was to invest the Secretary-General with discretionary powers in regard to the termination of temporary appointments. Article 9 (1) (*c*) provides that the Secretary-General may terminate temporary appointments if, in his opinion, such action would be in the interest of the United Nations. Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision. With regard to the case under consideration, the applicant was informed that the reason for the termination of her appointment was a recommendation of the Walters Selection Committee. The function of the Walters Selection Committee was to make recommendations to the Secretary-General as to which temporary staff (a) should be granted permanent appointments, or (b) should be placed on probation for a further period of one year, or (c) should have their appointments terminated. On October 8, 1952, the Walters Committee made a recommendation jointly as to this applicant and four other staff members, concerning whom it recommended as follows:

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[1] See *supra*, p. 506.

" 'The committee is reluctant to recommend termination in the case of staff members who have given, and are giving, honourable service within the limit of their capacities, and whom it would have recommended for permanent appointment at a high level in the General Service category. Nevertheless, in view of the necessity of sparing no effort to raise the average professional in the professional category to the highest possible level, it is not prepared to recommend permanent appointment in any of these cases. Nor can it recommend a period of probation.

'Accordingly, it recommends termination of these five staff members and proposes that, if termination is decided upon, favourable consideration should simultaneously be given to the possibility of reclassification so as to enable the staff members concerned to continue in his or her present work.'

"As a result of the Committee's recommendation, the Director of the Bureau of Personnel sent a memorandum to the applicant stating:

" 'The Secretary-General has given the most thorough consideration to this report [Walters Committee] and in view of the recommendation of the Committee, has decided to terminate your temporary appointment. He has further decided not to reclassify, at least for the time being, the post you presently occupy.

'This letter will constitute formal notice that your appointment will be terminated as of 21 November 1952. At the same time, I wish to inform you that you may apply for any posts in the general service category which are vacant, but with no assurance whatever of reappointment.'

" The Tribunal finds that the grounds alleged by the respondent for the termination of the applicant's employment appear to be such as might enable the Secretary-General to reach the opinion that the termination was in the interest of the United Nations under Article 9

(1) (*c*) of the Staff Regulations. Moreover, no evidence has been adduced establishing improper motivation for the termination of the appointment of the applicant.

"Accordingly, the Tribunal rejects the claim . . ."

[Report: Judgment No. 26, U.N.Doc. AT/DEC/26.]

International Organizations—Officials of—Dismissal of—Reasons for Dismissal—Permanent Appointments—Enquiries by National Authorities into Alleged Subversive Activities—Independence of International Civil Servants—Rights to Freedom of Opinion and Constitutional Guarantees—Definition of Service.

GLASER *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. August 26, 1953.

THE FACTS.—The complainant entered the service of the United Nations on September 29, 1947, as a clerk-typist and, after holding a temporary (later termed "temporary-indefinite") appointment, she received a permanent contract on July 1, 1952. In January 1953, the complainant received a questionnaire circulated to all United States citizens members of the staff of the United Nations Secretariat under the Executive Order of January 9, 1953, of the President of the United States, providing for the investigation of the loyalty towards the United States Government of such officials. The complainant was informed by the competent United Nations official that she had the right to refrain from filling up the questionnaire, but was nevertheless urged to do so, and upon the complainant's firm refusal the official stated that he would be forced "to turn her name over". Shortly after a conference with the same official, the complainant was summoned to appear before a Federal Grand Jury, and later before the Internal Security Sub-Committee of the United States Senate, which was investigating alleged subversive activities of United States citizens employed by the United Nations. At the Sub-Committee's hearing, she refused to answer questions put to her, pleading privilege under the Fifth Amendment to the United States Constitution, which embodies the guarantee against self-incrimination. On May 4, 1953, the complainant received a communication from M. George-Picot, Assistant Secretary-General of the United Nations, advising her that the Secretary-General had appointed a Committee to "ascertain and report to the Secretary-General on the facts, circumstances and reasons that had led the complainant to invoke the privilege against self-incrimination before the Internal Security Sub-committee of the United States Senate and on related matters". On May 6, 1953, the complainant appeared before the Committee appointed by the Secretary-General. She was asked questions relating to her invocation of the privilege under the Fifth Amendment and was involved in an extensive colloquy with respect thereto, the Secretary-General being present to observe. By a letter of May 14, 1953, the Assistant Secretary-General in charge of the Department of Administrative and Financial Services notified the complainant that she had acted " in violation of her obligations under Staff Regulation 1 (4) and under her oath to the United Nations ", that her action had " rendered her unsuitable for service as a United Nations staff member ", and that consequently she was " subject to termination for unsatisfactory services under Staff Regulation 9 (1) (*a*)". The complainant's appointment was terminated with immediate effect and she received cash compensation in lieu of notice. The Secretary-General agreed to the direct reference of the case to the Tribunal, without previous consideration by the internal Joint Appeals Board, and the complainant appealed against the termination of her appointment, requesting reinstatement in her former post.

The main contentions of the complainant were as follows:

(a) The procedure followed by the Secretary-General was in violation of Staff Regulations. In particular, the complainant was refused the fundamental right of counsel in a hearing conducted by the *ad hoc* Committee appointed by the Secretary-General, whose findings had a decisive influence on the decision taken in respect of the termination of her appointment.

(b) The termination of her appointment was a violation of the complainant's rights of freedom of speech, conscience and association, and of her rights under the United States Constitution and the Universal Declaration of Human Rights. The decision further violated the freedom of opinion recognized by Article 1 (4) of the Staff Regulations.

(c) The finding that the complainant's employment had to be terminated because her services were unsatisfactory was unwarranted in fact and at law. The termination of the complainant's appointment was without justification in Regulation 9 (1) (*a*) or in any other applicable Regulation or Rule.

(d) Termination of the complainant's appointment constituted a breach by the Secretary-General of her contract of employment and added a new condition of employment. It represented interference with the complainant's acquired rights.

(e) The termination of complainant's appointment was contrary to the Charter and to the oath required of the Secretariat, including the Secretary-General, in that it was part of a general plan to give the United States Government control over the recruitment and employment of its nationals by the United Nations.

The following contentions were made on behalf of the Secretary-General.

(a) The Secretary-General's decision was in no way concerned with the refusal of the complainant to complete the questionnaire issued by the United States authorities or with her appearance before a Federal Grand Jury.

(b) Where the Staff Regulations did not prescribe a specific procedure, the Secretary-General was entitled, before terminating an appointment, to inform himself of facts through such channels as he deemed appropriate. There was no provision in the Staff Regulations for representation by counsel before a fact-finding committee.

(c) The pleading of privilege constituted an " action " or " public pronouncement " which might adversely reflect on the status of an official as an international civil servant and created a presumption against the person pleading privilege. By so doing, the complainant failed to show the reserve and tact incumbent upon her by reason of her international status. Knowing the difficulties her conduct would cause the Organization, the complainant acted in accordance with what she deemed to be her own personal interest rather than in accordance with the interest of the United Nations. She thus disregarded her obligations under Article 1 (4) of the Staff Regulations and under her oath to the United Nations. Her appointment could therefore properly be terminated under Article 9 (1) (*a*) for unsatisfactory services.

(d) The complainant was aware that a plea of constitutional privilege had been defined by the Secretary-General as improper, and she acted with full knowledge thereof.

Held: that an appointment can be terminated for unsatisfactory services only when an official's professional activities within the United Nations itself prove unsatisfactory, that the conduct of the complainant did not constitute unsatisfactory services, and that consequently the complaint was well-founded.

The Tribunal said: " . . . The Tribunal notes the respondent's statement that the procedure before the Grand Jury and the conduct of the applicant with respect to the questionnaire circulated among United States citizen staff members of the Secretariat were not taken into consideration in deciding that the applicant's appointment should be terminated.

" The Tribunal must, however, record the fact that the *ad hoc* Committee appointed by the Secretary-General questioned the applicant on the reasons that had led her not to answer the questionnaire.

" Moreover, in the Secretary-General's memorandum of May 13, 1953, stating the reasons for terminating the applicant's appointment, the conclusions regarding the moral obligation of loyalty to third persons relate only to the replies made by the applicant in respect of the questionnaire. At no time did the applicant plead before the *ad hoc* Committee appointed by the Secretary-General the interest of third persons as a justification for claiming privilege under the Fifth Amendment.

" With regard to the procedure followed before the decision now contested was taken, the Tribunal recognizes that the Secretary-General may, if he deems fit, set up a special committee to clarify or advise him on a specific situation. Such a committee cannot, however, supersede the bodies set up by the Staff Regulations or Rules in cases where the intervention of such bodies is prescribed.

" The Tribunal must consider whether, in view of the complaints made, the respondent was entitled to terminate the applicant's appointment under Staff Regulation 9 (1) (*a*). Staff Regulation 9 (1) (*a*) provides for the dismissal of the holder of a permanent appointment when his ' services . . . prove unsatisfactory '. The French text uses the words 'services qui ne donnent pas satisfaction'. The decision taken by the Secretary-General implies that the applicant's services had proved unsatisfactory. The Tribunal must therefore seek an accurate interpretation of the word ' services ' in relation to a staff member.

" The term ' services ' and ' service ' is used on several occasions in the Staff Regulations and Rules. In the English text of the Staff Regulations it is found, *inter alia*, in Regulation 1 (6) (war service), 4 (4) (service of the United Nations), 9 (1) (*a*) (necessities of the service, unsatisfactory services) and in the title of Article IX (Separation from service). The French text renders the term as ' emploi ' (title of Article IX), and as ' service ' (Article 4 (4)) or as ' services ' (Articles 1 (6) and 9 (1) (*a*)). The Staff Rules in force when the applicant's appointment was terminated exist only in English. They contain the word ' service ' in many provisions: 103 (21) (mission service), 104 (3) (period of service, staff member's services), 104 (12) (full-time satisfactory service), 105 (1) (his service is expected to continue), 107 (4) (one year of service), 109 (1) (the necessities of the service, suitable posts in which their services can be effectively utilized), 109 (10) (certification of service, leaving the service), 112 (6) (the service and conduct).

" From a comparison of these various phrases, it appears that the term ' service ' is used in the singular with the meaning of ' nature of employment ' or ' functions ' (103 (21)), and in both the singular and the plural in the current normal meaning of ' work done for someone '. The term ' service ' is thus applicable to the professional activities of staff members.

"When the Staff Regulations refer to the whole of the obligations incumbent on the staff, other terms are used: Regulations 1 (3) and 1 (4) mention ' duties ' (*devoirs et fonctions*); Regulation 1 (9) refers successively to ' functions ' and ' conduct ' (*fonctions, conduite*). It thus appears that the term ' services ' is never used in the Staff Regulations to denote the whole of the obligations incumbent upon staff members, but refers to the carrying out of the tasks entrusted to them in the Secretariat.

" Staff Regulation 9 (1) (*a*) thus permits the termination of an appointment only when a staff member's professional activities within the United Nations itself prove unsatisfactory. This interpretation is confirmed by the modification made in 1952 in the provision on disciplinary measures. Regulation 19 of the Provisional Staff Regulations provided for disciplinary measures in the case of unsatisfactory 'conduct or work'. When the Staff Regulations were being revised, the Secretary-General informed the Fifth Committee on January 19, 1952, that with regard to Article X (relating to disciplinary measures) the Advisory Committee had omitted reference to disciplinary measures in cases where work proved unsatisfactory, since paragraph 1 of Article 9 already covered the case.

" It does not follow that no measures can be taken in cases of breaches of the obligations created by the Staff Regulations concerning the behaviour of staff members outside their professional duties. These obligations concern the conduct of staff members, and breaches of such obligations come under the provisions of Article X. Article X makes no distinction between cases where the alleged acts were committed in carrying out professional duties and where they were committed outside the Organization, in so far as the private life of the staff member must conform to special provisions. In the event of breaches of staff members' obligations under the oath in respect of their conduct, disciplinary measures can thus be taken under Article X.

" Moreover, with regard to Staff Regulation 1 (4), a member of the Fifth Committee asked during the discussion on the revision of the Staff Regulations at the 333rd meeting on January 22, 1952, how this provision would be applied in practice. The Chairman pointed out that the Secretary-General was authorized under Staff Regulation 1 (4) to take disciplinary measures in respect of the staff. He added that the Secretary-General was himself responsible to the General Assembly for the manner in which he discharged his duties. No objection was made to this statement. Hence, in the case of complaints against the conduct of a staff member, his appointment, except in the event of serious misconduct, can be terminated only in the circumstances and subject to the guarantees laid down by the Secretary-General in the Staff Rules framed in application of Staff Regulation 10 (1).

" In the case under consideration, the breaches of the oath and of Staff Regulation 1 (4) of which the applicant is alleged to be guilty concern her behaviour before an official organ of the United States and relate to acts outside her professional duties. They concern her private life, not her professional life. The obligations by which she may be bound in that respect relate to her conduct, not to her services. The same is true of the complaint that she did not take into consideration the Secretary-General's decision with regard to pleading privilege under the Fifth Amendment, a decision of which she was deemed to be fully aware. This decision, which was never embodied in explicit instructions addressed to the staff, in any case concerned the conduct of the staff members, not their services. Failure to comply with it cannot be dealt with under Staff Regulation 9 (1) (*a*).

" Consequently, the Tribunal cannot consider that the complaints made against the applicant, even on the assumption that they are well-founded, relate to her services. In any case, the Secretary-General's memorandum of May 13, 1952, ended the enumeration of these grounds for complaint with the statement that the applicant had chosen ' not to regulate her conduct with the interests of the United Nations only in view '.

" It may, of course, be considered that a staff member who disregards the obligations laid down by the Staff Regulations concerning his conduct is unsuitable for service with the United Nations in the sense that it is desirable that he should not be employed there, but it does not follow that his services have proved to be unsatisfactory and that his appointment can be terminated under Staff Regulation 9 (1) (*a*).

" The Tribunal consequently holds the application to be well-founded and orders, under Article 9 of its Statute, the rescinding of the decision contested and the reinstatement of the applicant."

The Tribunal ordered the reinstatement of the complainant, and awarded her full salary from the date of termination to the date of reinstatement. The Secretary-General having decided that it would be inadvisable to reinstate the complainant, the Tribunal awarded her, by a further decision of October 13, 1953, compensation in the amount of 7,500 dollars, plus salary up to the date of the second judgment.

[Report: Judgment No. 38, U.N.Doc. AT/DEC/38.]

NOTE.—With respect to the appearance of United States citizens employed by the United Nations as witnesses before United States Federal Grand Juries or Congressional Committees, and the investigation of the loyalty of such officials by United States governmental agencies, see *Crawford* v. *Secretary-General of the United Nations* (*supra*, p. 501).

International Organizations—Officials of—Dismissal of—Professional Competence.

LEVINSON *v.* SECRETARY-GENERAL OF THE UNITED NATIONS.

Administrative Tribunal of the United Nations. December 11, 1953.

THE FACTS.—The complainant first served as a translator on a fixed-term appointment made for the purposes of the General Assembly, from August 25 to December 31, 1947. On July 2, 1948, he was granted a temporary-indefinite appointment as a Social Affairs officer in the Department of Trusteeship. On October 16, 1952, the Director of the Bureau of Personnel notified the complainant that the Secretary-General had decided to terminate his appointment on November 21, 1952, on the basis of a recommendation of the Walters Selection Committee which stated that " The Committee considers that Mr. Levinson is not fully qualified either by experience or by knowledge to take an adequate share in the work of the Secretariat ". The function of the Walters Selection Committee, (composed of senior officials of the United Nations and presided over by an independent chairman, Mr. F. P. Walters, formerly Deputy Secretary-General of the League of Nations) was to review the position of United Nations officials holding temporary-indefinite contracts and, having regard to their professional competence, to recommend to the Secretary-General either the grant of a permanent appointment or the termination of their appointment. The Committee was established by the Secretary-General in order to submit to him recommendations designed to reduce, in accordance with the desire of the General Assembly, the over-large number of temporary employees of the United Nations through the grant of permanent appointments to those considered by the Committee as professionally competent and the termination of the appointment of those whose competence the Committee regarded as inadequate. On November 10, 1952, the complainant requested the Bureau of Personnel to consider the possibility of reclassifying him in a lower grade, but received no reply. On November 20, 1952, the complainant requested reconsideration of the decision to terminate his appointment and, in view of the refusal he encountered, filed an appeal with the internal Joint Appeals Board. On April 7, 1953, after receiving the report of the Joint Appeals Board, the Secretary-General informed the complainant of his decision to reaffirm the termination of his appointment. The complainant referred this decision to the Administrative Tribunal, requesting reinstatement in his former post, and damages.

The complainant advanced the following contentions:—(a) The termination of his appointment violated the applicable Staff Regulations and Rules. (i) No affirmative finding of cause constituting reasonable grounds for termination had been made. The Walters Selection Committee had made its statement concerning the complainant's qualifications despite the high opinion of the complainant held and expressed by his immediate superiors. The Joint Appeals Board Report, while making no recommendation in support of the complainant's case, recorded that " there was no apparent conflict of views concerning the appellant's qualifications" and, in view of testimony received, directed attention to the fact that " the wording of the Walters Committee recommendation does not coincide with the high commendation of the responsible director, and . . . therefore this wording might have a different connotation, which was not within the competence of the Board to ascertain ".

Nevertheless, the Secretary-General reaffirmed his decision. (ii) The complainant's efficiency and competence had never been questioned during his service in the United Nations, and lack of qualification could not therefore be advanced as a reason for termination.

(b) The dismissal violated the requirements of due process because the complainant did not receive a statement of cause in terms sufficiently specific to facilitate proceedings before the Appeals Board and the Administrative Tribunal. In asserting a right to a statement of cause of termination of appointment, the complainant relied on the Tribunal's decision in *Howrani et Al.* v. *Secretary-General* (see *International Law Reports*, 1951, p. 452). The very structure of the Walters Committee, its method of operation and its deliberate destruction of its records also made it impossible for the complainant adequately to present his case.

(c) The Secretary-General failed to make any effort to place the complainant in another post and thus disregarded the ruling of the Administrative Tribunal in *Howrani et Al.* v. *Secretary-General* (*supra*) that in the case of employees with service ratings of " Satisfactory " or better, there was a presumptive right to consideration for posts elsewhere in the Secretariat for which their qualifications were appropriate, and that an essential element of due process was an affirmative showing either that reasonable efforts had been made to place such employees in other posts or a statement of reasons why this was not done.

The following contentions were made on behalf of the Secretary-General: (a) The termination of the complainant's appointment was effected in accordance with the terms and conditions of his appointment. The complainant's temporary appointment was terminated under the authority of Staff Regulations 9 (1) (*c*) and Staff Rule 103 (*c*). Staff Regulations 9 (1) (*c*) made it clear that [appointments of] the temporary staff of the United Nations [were] subject to termination when such action was in the interest of the United Nations, and that the Secretary-General and he alone was the judge as to whether or not the interests of the United Nations required termination.

(b) In terminating the complainant's appointment, all the requirements of due process had been fully satisfied. (i) The termination was effected on a clear and valid ground, namely, that the complainant was not fully qualified, either by experience or knowledge, to take an adequate share in the work of the Secretariat. In any case, the Secretary-General was the final judge in such matters. (ii) Not only were all the elements of due process required under the applicable Staff Regulations and Rules observed by the Secretary-General, but the Secretary-General as an additional safeguard in the interests of both the staff and the Organization sought the advice of the Walters Committee before taking a decision concerning the termination of the complainant's appointment. The Walters

Committee was free to adopt its own rules of procedure, and the manner in which it proceeded was reasonable in view of the special nature of its task.

(c) No effort had been made to place the complainant in another post because of the need to reach a final decision regarding the future of all officials in the complainant's position; subject to certain exceptions, the decision in each case must be either termination or the grant of a permanent appointment.

Held: that the complaint must be dismissed. The Secretary-General enjoyed discretionary powers respecting the termination of temporary appointments; and he was entitled to set such standards for recruitment for permanent appointments as appeared appropriate to him. Moreover, there was no evidence of improper motivation for the termination of the complainant's appointment.

The Tribunal said: ". . . Regulation 9 (1) (*c*) provides that the Secretary-General may terminate temporary appointments if, in his opinion, such action would be in the interest of the United Nations. The discussions in the Fifth Committee show that the intention of the authors of the United Nations Staff Regulations approved by General Assembly Resolution 590 (VI) on February 2, 1952, was to invest the Secretary-General with discretionary powers in the termination of temporary appointments. Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision.

" With regard to the case under consideration, the applicant was informed that the reason for the termination of his appointment was a recommendation of the Walters Selection Committee. The function of the Walters Selection Committee was to make recommendations to the Secretary-General as to which temporary staff (a) should be granted permanent appointments, or (b) should be placed on a further probationary period of one year, or (c) should have their appointments terminated. The Walters Committee's recommendation as to the applicant was that his appointment be terminated as the Committee considered him not fully qualified, either by experience or by knowledge, to take an adequate share in the work of the Secretariat.

"As the result of the Committee's recommendation, the Director of the Bureau of Personnel sent a memorandum to the applicant on October 16, 1952, stating that the Secretary-General had given the most thorough consideration to the report of the Walters Committee and had decided to accept the recommendation that the applicant's temporary appointment be terminated as of November 21, 1952.

"As regards the argument alleging the absence of due process before the Walters Committee, the Tribunal notes that the Committee was an internal administrative body, established by and functioning in the way approved by the Secretary-General in order to tender him advice. It is not for the Tribunal to express an opinion on internal administrative practices adopted by the Secretary-General.

" The Tribunal notes that the Secretary-General was aware of the procedure of and the methods followed by the Committee and decided to accept the recommendations of this body.

" The Tribunal notes that the applicant's immediate superiors considered him fully qualified for the post he occupied. On the other hand, the Secretary-General is entitled to set such standards for recruitment to permanent appointments as appear to him to be appropriate. Accordingly, the Tribunal finds that the grounds alleged by the respondent for the termination of the applicant's employment appear to be such as might cause the Secretary-General to reach the opinion that the termination was in the interest of the United Nations under Article 9 (1) (*c*) of the Staff Regulations. Moreover, no evidence has established improper motivation for the termination of the applicant's appointment.

"Accordingly the Tribunal rejects the claim."

[Report: Judgment No. 43, U.N.Doc. AT/DEC/43.]

NOTE.—(1) Similar decisions were handed down by the Tribunal on the same day, in the cases of *Bergh*, *Mohan*, *Wang*, *Carruthers*, and *Brown*, with minor variations pertaining to the nature of the Walters Committee's criticism of the complainants' competence, and the allegation of personal prejudice made by some of the complainants, which the Tribunal, after investigation, held to be unfounded. While the contentions of the parties were not always identical with those reported in the present case, partly because of differences in the employment history of the complainants, their general import was the same, and the Tribunal came in each case to the same conclusions on the legal issues involved.

(2) Similar decisions were also handed down by the Tribunal on the same date in the cases of *White* and *Carter*. These two complainants held fixed-term appointments which were not renewed as a result of recommendations of the Walters Committee. However, the Tribunal held that according to the Rules in force at the material time, fixed-term appointments were to be regarded as temporary appointments and that, the Secretary-General having to take a decision on the future employment of holders of fixed-term appointments, he was entitled to consult the Walters Committee on the question. The Tribunal further held that in accepting the recommendation of the Walters Committee and in so notifying the complainants, the Secretary-General had given a valid reason for not granting a new appointment to the complainants. The Tribunal also reaffirmed the view that it should not, on the merits of individual officials, substitute its own judgment for that of the Walters Committee. On all other legal issues, the Tribunal's decisions were identical with those reported in the *Levinson* case.

International Organizations—Officials of—International Labour Organization—Contracts of Officials—Termination of—Jurisdiction of Administrative Tribunal—Law to be Applied—*Non liquet*.

DESGRANGES *v.* INTERNATIONAL LABOUR ORGANIZATION.

Administrative Tribunal of the International Labour Organization.
August 12, 1953.

THE FACTS.—The complainant was appointed a member of the staff of the Paris Branch Office of the International Labour Office by letter of the Executive Secretary of the Branch Office dated April 26, 1948, and took up her duties on May 3, 1948. At the material time, the Staff Regulations of the International Labour Office provided that conditions of service of members of the staff of Branch Offices were to be governed by special regulations to be made by the Director-General. While no such rules had been made at the time, the Director-General, relying on the established practice of the International Labour Office, as endorsed by the Governing Body of the I.L.O., asserted, and the complainant, in her submission, agreed, that the national legislation governing the conditions of employment of national civil servants of the State in which an I.L.O. Branch Office is situated should be applied by analogy to the staff of the Branch Office concerned, which, like all Branch Offices, comprised locally recruited nationals of the country in which the Branch Office was located—unlike headquarters establishments of the I.L.O., the staff of which is recruited on a broad geographical basis and governed by specific Staff Regulations, the text of which is approved by the Governing Body. Accordingly, the complainant's post was assimilated to a corresponding post in the French civil service, namely, that of probationer *rédacteur*. Subsequently, the post was regraded and assimilated to that of a probationer administrative assistant in the French civil service. The complainant's name appeared on the list of staff of the Paris Branch Office, which was included in the general list of personnel regularly submitted to the Governing Body of the I.L.O., under the heading "Temporary Staff". The appointment of the complainant was not embodied in a written contract, since no rule provided for such contracts in the case of members of the staff of Branch Offices. The complainant was responsible for perusing and analysing the French daily press. By letter dated April 13, 1950, the Executive Secretary of the Paris Branch Office informed the complainant that, as a result of a decision of the Director-General of the International Labour Office to abolish the press analysis service, for which she was responsible, her employment would terminate on May 15, 1950, after the expiry of a month's notice starting on April 15. Should the complainant continue to work during the period of notice, compensation in the form of a month's salary for each year of service, *i.e.*, two months' salary, would be granted to her, together with compensation for leave, in conformity with the provisions governing the discharge of the French civil servants to whom she had been assimilated. By letter of April 21, the complainant sent to the Chief of the Administrative Division of the I.L.O., *i.e.*, the headquarters senior official in charge of personnel, a copy of her letter of protest addressed to the Executive Secretary of the Paris Branch. She stated that she proposed to object to her discharge as having been decided upon in a manner contrary to French law, and requested the chief of the Administrative Division to re-examine the position. By letter of May 2, the Executive Secretary of the Paris Branch Office confirmed the decision to discharge the complainant and the terms of the discharge. In accordance with instructions from the Chief of the Administrative Division, this letter pointed out that the appointment of personnel of Branch Offices was within the jurisdiction of the Director of each such Branch Office and not of the Headquarters Office at Geneva; and that, although the Administration did all that was possible to base terms of appointment of members of the staffs of Branch Offices on the laws and regulations of the countries where the Branch Offices were respectively located, there had never been any question of giving such staff members conditions absolutely equivalent to those of national civil servants, particularly as regards security of tenure. As, owing to the immunities enjoyed by the International Labour Organization, the complainant was unable to have recourse to a French court against the decision to discharge her or the terms of this discharge, and as the internal joint appeals committee provided for in the I.L.O. Staff Regulations had no jurisdiction over appeals from members of the staff of Branch Offices, it was decided, *ex gratia*, in order not to deprive the complainant of any recourse to an impartial body, that she should be allowed to submit her case, if she so desired, to a special *ad hoc* committee established for the purpose at headquarters, and comprising, as in the case of the joint committee provided for in the Staff Regulations, three officials appointed by the Director-General, three officials appointed by the Staff Union, and an independent Chairman. This committee, like the statutory joint committee, was to be advisory, the final decision resting with the Director-General himself. On August 5, 1950, the complainant informed the Director-General of her decision to submit her case to the *ad hoc* committee, instructed the then Secretary of the Headquarters Staff Union Committee to represent her, and submitted a memorandum for presentation to the Special Joint Committee. The Special Joint Committee submitted its conclusions to the Director-General on March 12, 1951. The report of the Committee has never been made public but was available to the Tribunal which, in the judgment, referred to the fact that the Committee " unanimously invited the

Director-General to consider the possibility of granting the Complainant an indemnity amounting to six months' salary ". By letter of June 2, 1951, which was communicated to the complainant by the Executive Secretary of the Paris Branch Office on June 12, the Head of the Personnel Office of the International Labour Office informed the complainant that, following her appeal to the Special Joint Committee, the Director-General had decided, in the light of all the information provided regarding her case, to confirm the decision previously taken, *i.e.*, to maintain unaltered the terms of her discharge. Article VII, para. 2, of the Statute of the Administrative Tribunal provides that " to be receivable a complaint must . . . have been filed within 90 days after the Complainant was notified of the decision impugned ", while Article 7, para. 1, of the Rules of Court further provides that complaints must be submitted on a special form, which may be obtained from the Registrar of the Tribunal. By letter of August 31, 1951, addressed to the Registrar of the Tribunal, the complainant stated that she appealed to the Tribunal against the decision to terminate her appointment. She pointed out that the decision appeared to be a final one, since she had exhausted all the means of resisting it that were open to her. The complainant added that she wished her case to be included in the agenda of a session of the Tribunal to be held in the near future, requested to be informed of the nature of the documents to be submitted to the Tribunal in support of her complaint, and inquired within what period her complaint should be submitted. In the same communication, the complainant requested the authorization of the President of the Tribunal to be represented by an official to be designated by the Staff Union of the I.L.O. (instead of a member of the regular Bar of a Member country of the I.L.O., as provided for in the Rules of Court). By letter dated September 11, 1951, the Registrar of the Tribunal sent the complainant a copy of the Statute and Rules of Court of the Tribunal, together with copies of the form on which complaints must be drawn up. By letter dated September 19, the Registrar communicated to the complainant a decision of the President of the Tribunal authorizing her to be represented by an official to be designated by the Staff Union of the I.L.O., in accordance with her request. On September 26, having been informed by the Administrative Division of the I.L.O. that the complainant, in a letter to the Head of the Personnel Office in Geneva, by which she applied for a vacant post, mentioned a complaint pending before the Tribunal, the Registrar wrote to the complainant, referring to his previous communications of September 11 and 19, and stating that the Tribunal had received no complaint from her. On October 24, the agent for the complainant, who had been designated by the Staff Union of the I.L.O., notified the President of the Tribunal that a complaint, in the form prescribed in the Rules of Court, had been filed with the Registrar. A reply, a rejoinder and a surrejoinder were thereafter filed by the parties in accordance with the Rules of Court.

The following contentions were advanced by the complainant: (i) that she was entitled, in the absence of specific rules governing her conditions of employment, to the benefit of French legislation, under which in the case of abolition of post she should have been retained in service because, in view of her seniority rights and her position as a married woman and mother of one child, she enjoyed priority over a woman probationer official who had been appointed in a temporary capacity during her maternity leave and was retained on the staff after the termination of her own appointment; (ii) that, should the Staff Regulations of the I.L.O. be applicable, instead of French law, the termination of her appointment was illegal since her post had not in fact been abolished, her previous work being carried out by several members of the staff of the Branch Office, among whom it was shared. In the alternative, if her post had in fact been abolished, she was entitled, under the relevant provisions of the I.L.O. Staff Regulations, to a termination indemnity amounting to six months' salary instead of the two months' salary indemnity she had been granted.

In reply, the following contentions were advanced on behalf of the Director-General of the I.L.O.: (i) The complaint was not receivable because it had not been submitted within 90 days of the notification of the Director-General's decision to confirm the termination of the complainant's appointment. Alternatively, the complaint was not receivable because it had been submitted more than 90 days, in fact more than a year, after the Registrar had sent the complainant a copy of the Statute and Rules of Court of the Tribunal, together with the prescribed forms for instituting a complaint, or, subsidiarily, more than 90 days after the Registrar had notified the complainant of the President's authorization to be represented by an official designated by the Staff Union of the I.L.O., instead of a member of the regular Bar. The provisions of the Rules of Court relating to the time limit for the submission of complaints were mandatory and if they had been ignored by the complainant, since the facts of the case precluded any possible misunderstanding on the matter, she alone should be responsible by virtue of the rule *nemo censetur legem ignorari* or alternatively the rule *error nobis nocet.* (ii) In the alternative, the Tribunal was not competent to entertain the complaint. Under Article II of the Statute of the Tribunal, access to the Tribunal was restricted to officials of the International Labour Office. The complainant, while an employee of the International Labour Office, could not be regarded as an *official* of that Office, for the purposes either of the Staff Regulations or of the Statute of the Tribunal. (a) The complainant was assimilated to a member of the French civil service and was not placed in any of the categories or grades provided for in the Staff Regulations, which were applicable exclusively to headquarters officials. (b) Furthermore, the substantive formalities provided for in the Staff Regulations in respect of the drawing up of a letter of appointment and its acceptance had not been observed in the case of the complainant. (c) Finally, after the complainant's appointment, revised Staff Regulations had come into force which provided for a clear distinction between headquarters officials, to whom the Regulations were applicable, and other employees of the I.L.O., to whom other rules (not made or published at the material time, although provided for) should be applicable. The complainant never belonged, nor claimed to belong, to the category of staff to whom the provisions of the Staff Regulations were applicable, and never enjoyed either the conditions of service or the remuneration applicable to that category. The jurisdiction of the Tribunal was of an institutional character and strictly bound by explicit provisions providing for it. The Director-General's administrative discretion was limited by explicit provisions of the Statute of the Tribunal and the Staff Regulations, which should be interpreted *stricto sensu* but could be freely exercised, within the limits of the Constitution of the International Labour Organisation, wherever such provisions were not applicable. Therefore, if the complainant, by virtue of the foregoing arguments, was not one of the persons who had access to the Tribunal under specific provisions, the Tribunal had no jurisdiction, and the exercise of the Director-General's discretion was not subject to judicial review.

Both the receivability of the complaint and the jurisdiction of the Tribunal having been challenged by the respondent, who declined to deal with the merits of the case, the complainant advanced the following additional arguments:

(i) A distinction should be made between the time limit applicable to the submission of a complaint and the rules governing the form in which a complaint should be submitted. The Statute of the Tribunal provided for the submission of a complaint within 90 days of the notification of the decision appealed against, and by her letter of August 31, 1951, the complainant had in effect lodged such a complaint. On the other hand, the complainant had submitted her complaint on the prescribed form, which was referred to only in the Rules of Court, after the expiry of the 90 days' time limit because this appeared to be a rule governing simply and only the form of a complaint, and could be complied with independently of the lodging of a complaint within the 90 days' time limit. The complainant believed her original application to have been valid and derived the impression from the communications of the Registrar that she should merely use the prescribed form to present additional arguments. In the circumstances, she maintained, the complaint was receivable since it had been submitted within the prescribed time limit and later supplemented by the submission of detailed arguments set forth on the prescribed form.

(ii) In respect of competence at law, the complainant contended that she should be regarded as an official *lato sensu* of the International Labour Office and, therefore, had access to the Tribunal. Members of the staff of Branch Offices were like officials of the I.L.O. *stricto sensu* employed by the I.L.O.; they were paid out of I.L.O. funds, subject to the authority of the Director-General, and participated in both the United Nations Joint Staff Pension Fund and the I.L.O. Staff Sickness Insurance Fund. There was, therefore, no justification for making a distinction between the two categories of employees, whose position was substantially the same. Furthermore, if the Staff Regulations provided that the conditions of employment of Branch Office staff should be governed by special rules, and that they were excluded from the scope of the Staff Regulations, this did not mean that they did not enjoy the status of " officials " and had no access to the Tribunal. The rule *nemo auditur propriam turpitudinem allegans* precluded the administration from relying on its own negligence, in not making special rules explicitly applicable to Branch Office staff, to refuse them access to the Tribunal. In equity, the complainant should have access to the Tribunal because if the Tribunal were not competent by virtue of the Staff Regulations, while the national courts were not competent by virtue of the immunities of the International Labour Organization, the complainant would have no means of redress except an appeal to an *ad hoc* joint committee, which was advisory in character and the recommendations of which had been set aside by the Director-General, and would thus be at the mercy of arbitrary administrative decisions. A problem arose in connection with the determination of the law applicable to the case if the Tribunal were competent; but, the complainant contended, in the absence of specific regulations applicable to Branch Office staff, the law being silent, the Tribunal should proceed by analogy and apply, *mutatis mutandis*, the provisions of French law or, alternatively, of the Staff Regulations.

Held: (1) on receivability—that, having regard to the circumstances, the submission of the complaint was not out of time and was receivable; (2) on competence—that the Tribunal was competent; and (3) on the substance of the claim—that there was no ground for the reinstatement of the complainant but that she was entitled to a higher indemnity than she had been granted, since she was entitled to the same termination indemnity as permanent French civil servants, instead of the indemnity payable to temporary civil servants.

The Tribunal said ". . . The dismissal of the complainant in April 1950 was upheld by decision of the Director-General dated 2 June 1951, and transmitted to the Director of the I.L.O. Branch Office in Paris by letter on 12 June 1951; . . . the complainant, having exhausted all means of appeal available to her, sent the Registrar a letter on 31 August 1951 which in particular contained the following statement: 'I take the liberty of appealing to the Administrative Tribunal of the I.L.O. . . . I should therefore like the case to be placed on the agenda of a forthcoming session of the Administrative Tribunal and would be grateful if you would inform me what documents I must produce in support of my application. Must I prepare a file containing a copy of the letter of dismissal and all subsequent correspondence or is a detailed memorandum enough? What is the final date by which it must reach you? . . . I am also writing to the President of the Administrative Tribunal asking him to authorise me to be assisted or represented by an official to be appointed by the Staff Union'; . . .

". . . This letter, as it is formulated, constitutes a complaint submitted within 90 days after the complainant was notified of the decision impugned; . . . this complaint did not fulfil the conditions laid down in Article 7 of the Rules of Court of the Administrative Tribunal, and under the terms of paragraph 4 of Article 7 the Registrar should have called upon the complainant to make the necessary corrections in her complaint within one month and have returned the papers to her for that purpose; . . . the Registrar did not apply paragraph 4 of Article 7 of the Rules of Court, but merely sent the complainant, in a letter dated 11 September 1951:

(a) one copy of the Statute and Rules of Court of the Administrative Tribunal;
(b) seven copies of the form mentioned in Article 7 of the Rules of Court of the Administrative Tribunal,

without mentioning the final date by which those documents, after correction, should have been returned to him; this letter of the Registrar was extremely brief and did not reply to any of the questions asked by the complainant, but was on the contrary of such a nature as to lead her to assume that her complaint was accepted as it stood; after the complainant had written a letter to the International Labour Office in which she stated: 'I have appealed to the Administrative Tribunal, which has not yet rendered judgment', the Registrar informed her in a letter of 26 September 1952 that at that time the Administrative Tribunal had not received any complaint from her, and consequently it was only after receipt of that letter that the form and copies referred to in Article 7 of the Rules of Court, signed and dated 24 October 1952, were communicated to the Registrar; in the circumstances described above this communication cannot be considered as untimely;

"The complaint is therefore receivable."

On the question of competence, the Tribunal said: "The Administrative Tribunal, by virtue of the very purpose for which it was created, should be considered as governed by general legal principles (*instance de droit commun*) with the necessary powers to guarantee the security of employment of all officials attached to the International Labour Organisation;

"From the standpoint of equity there is no ground for distinguishing between officials of the International Labour Office properly so-called and persons in the category to which the complainant belongs. . . . persons in the latter category have all the fundamental characteristics of officials, namely, the continuous devotion of their activities to the agency which employs them; the fact that they are under the authority of the Director-General; the fact that their conditions of service are determined by way of regulation, unilaterally and not contractually; the fact that they have access to the Sickness Insurance and Pension Funds; etc.; . . .

"One of the fundamental tenets of all legal systems is that no court may refrain from giving judgment on the grounds that the law is silent or obscure; it is clear from the statements of the Administration and the unanimous opinion of the Special Joint Committee, set up to deal with the case, that the absence of positive legal provisions concerning the employees of the Branch Offices would make their situation extremely precarious and would expose them to arbitrary decisions without allowing them any right of appeal either to national tribunals or [to] the Administrative Tribunal;

"The Staff Regulations in their present form describe persons in the category concerned as officials, only in order to make it clear that they shall be subject to special conditions of service to be provided for them; but, in the absence of such specific conditions being provided, they cannot be left without any right of appeal. It is unthinkable that the International Labour Organisation, which was established to ensure the security of all wage earners, does not desire to assure that of all its officials, and the spirit in which the existing legislation should be interpreted is thus quite clear.

"The Tribunal is therefore competent to judge the matter submitted to it."

On the substance of the claim, the Tribunal said: "The circumstances show that the two parties seem to agree implicitly that the national legislation of the place in which the I.L.O. Branch Office is situated should by analogy be applied in this case, and that the Director-General has himself stated that this is the procedure normally followed in all the Branch Offices; . . . moreover, . . . the Director-General set up an *ad hoc* Joint Committee for this case in order to follow as closely as possible the rules of equity governing the dismissal of officials. . . . The complainant was represented before that Committee. It is therefore necessary to inquire whether French legislation has been respected in this case and to bear in mind the opinion of the *ad hoc* Joint Committee which unanimously invited the Director-General to consider the possibility of awarding the complainant a sum equal to six months' salary as compensation. From this point of view the procedure followed in the dismissal of the complainant is certainly questionable, but . . . it has not been sufficiently proved to the Court that all the provisions of French legislation concerning the procedure of dismissal could have been applied. Therefore, there is no ground for reinstatement.

"As regards the amount of compensation, Articles 6 ff. of the French Act of 3 September 1947 concerning the conditions of discharge, in connection with general reduction of staff, of magistrates, officials and civil and military agents of the State, provide that an official dismissed as a result of the abolition of his post under conditions similar to those obtaining in the case of the dismissal of the complainant shall first receive four months' leave with pay plus an indemnity of one month's pay for each year of service.

"The complaint is therefore well founded in so far as it relates to the four months' additional compensation."

[Report: International Labour Office, *Official Bulletin*, vol. XXXV, No. 7, p. 212.]

International Organizations—Officials of—Dismissal of—Allegation that Dismissal Caused by Government of Country of Official's Nationality—Official's Claim for Damages against Home Government—Whether Municipal Courts Competent—The Law of France.

In re WEISS.

France, Conseil d'État. February 20, 1953.

THE FACTS.—Until 1941 the appellant, one Weiss, was an official of the International Institute of Intellectual Co-operation, an organization established in Paris under the aegis of the League of Nations. The precise status of the Institute was somewhat uncertain, in that by virtue of a French Law of August 6, 1925, it was "an autonomous foundation with legal status", a legal entity well known in French law. The Constitution of the Institute provided that "it is placed at the disposal of the League of Nations . . . and is independent of the authorities of the country in which it is established". Further, the administrative and financial management of the Institute was in the hands of a Commission of the League of Nations. At the beginning of the Second World War, the administration of the Institute was taken over by the French Ministry for Foreign Affairs.

In 1941 Weiss was dismissed from the Secretariat of the Institute, and after the end of the war the Administrative Tribunal of the International Labour Organization awarded him compensation for his dismissal.[1] The French courts granted exequatur of the award. Subsequently, the Ministry of Foreign Affairs wound up the Institute and transferred its assets to U.N.E.S.C.O., without providing for the payment out of those assets of compensation to

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[1] The judgment referred to is that of February 25, 1947, in *Weiss* v. *International Institute of Intellectual Co-operation*: International Labour Office, *Official Bulletin*, vol. XXX, No. 5, p. 395; *International Law Reports*, 1951, p. 458.

Weiss. In 1947, U.N.E.S.C.O. created a post for which the petitioner considered himself qualified, but the Commission set up by the French Government to examine, present and recommend candidates for employment in the United Nations and Specialized Agencies did not see fit to put him forward as a candidate, despite an agreement between U.N.E.S.C.O. and the Institute of Intellectual Co-operation that special consideration should be given to the candidature of former officials of the Institute.

Weiss now claimed damages from the French Government on the grounds (i) that it had in or about the year 1941 forced the Institute into liquidation, thus causing his dismissal, (ii) that it had, by parting with the assets of the Institute, prevented him from obtaining execution of the award, and (iii) that, by failing to support his candidature, it prevented him from obtaining a post with U.N.E.S.C.O.

On behalf of the French Government, it was contended that the French courts were not competent to deal with the petitioner's claims, on the ground that they were concerned with acts of the French Government *vis-à-vis* international organizations, alternatively with the legal relationship between an international organization and its officials.

Held: that the petitioner's claims were not subject to the jurisdiction of the French courts. The Institute was an international body (*organisme de caractère international*), and the Conseil d'État had no jurisdiction over difficulties arising between an international organization and one of its officials. Furthermore, the Conseil d'État had no jurisdiction over matters the examination of which would necessarily involve an appreciation of acts of the French Government performed in its relations with international organizations or foreign States. The acts of French authorities relating to the candidature of French nationals for posts in an international organization were directly connected with the appointment of officials of the organization and, like the appointments themselves, were not within the purview of the Conseil d'État.

The Court said: " In 1940 Dr. Weiss was legal adviser to the International Institute of Intellectual Co-operation. He was thus an official of an international body. This Court has no jurisdiction to determine disputes which may arise between such a body and one of its officials. The appellant contends that the French Government is liable to him in respect of acts of the Ministry for Foreign Affairs concerning the Institute, such acts having been committed at a time when the Ministry is alleged to have exercised powers over the Institute, and by reason of the subsequent refusal of the French authorities, especially when the assets of the Institute were transferred to U.N.E.S.C.O., to take the necessary measures to ensure the discharge of the liabilities of the Institute to the appellant, more particularly those resulting from the judgment of the Administrative Tribunal of the League of Nations (*sic*) which was made enforceable by an order of the Tribunal civil de la Seine of August 11, 1948. An examination of these questions necessarily implies an evaluation of acts of the French Government in its relations with international bodies or foreign States, and for this reason the Court has no jurisdiction to determine these questions. The appellant further contends that the Government is liable to him because it failed to support his candidature for a post with UNESCO when by virtue of the Agreement of November 30, 1946, his candidature ought to have received the special consideration due to former officials of the Institute of Intellectual Co-operation.[1] The acts of the French authorities concerning the candidature of French nationals for posts with an international organization are directly concerned with the nomination of officials of such organizations and are therefore, like the nominations themselves, outside the jurisdiction of this Court. It follows that the Court cannot adjudicate upon the appeal of Dr. Weiss."

[Report: *Clunet*, 81 (1954), p. 744.]

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[1] The Agreement referred to is one concluded between UNESCO and the International Institute of Intellectual Co-operation.

PART X

DISPUTES

A—ARBITRATION

I.—In General

ii.—The Law Applied by Arbitral Tribunals

Arbitration—Law Applied by Arbitral Tribunals—Arbitration between Government and Private Company—Meaning of Terms " Principles of Justice, Equity and Good Conscience " as Source of Arbitral Award—Agreement Concluded by Government of Islamic Country—Construction of Agreement—Availability of Settled Law in the Islamic Country Concerned—Legal Principles Applicable to Modern Commercial Contract.

RULER OF QATAR *v.* INTERNATIONAL MARINE OIL COMPANY, LTD.

Sir Alfred Bucknill (Referee). Arbitral Award of June 1953.

THE FACTS (as stated by the Referee).—" On the 5th August, 1949, an Agreement in writing, hereafter called the Principal Agreement, was made between His Excellency the Shaikh of Qatar of the first part, hereafter called the Ruler, and Sir Hugh Weightman on behalf of the Central Mining and Investment Corporation, a company registered in accordance with English law, and Robert Morton Allan Jr. on behalf of the Superior Oil Company, a California corporation, parties of the second part. They were acting as agents for a company to be formed, namely, the International Marine Oil Company, to whom in October, 1950, the parties of the second part assigned all their rights and obligations under the Principal Agreement. This Company is the Respondent to this Arbitration. Meanwhile the Ruler had assigned all his rights and obligations under the Principal Agreement to his son, His Excellency Shaikh Ali Bin Abdulla Al-Thani, who then succeeded as Ruler of Qatar, and is the Claimant in this Arbitration.

" By the terms of the Principal Agreement any doubt or dispute arising between the parties concerning the interpretation of the Agreement or concerning the rights or liabilities of either party under it, were to be referred to two arbitrators, and to a Referee chosen by them. In 1952 disputes and doubts arose; the parties nominated their arbitrators, and they then nominated me, the Right Honourable Sir Alfred Bucknill, a member of Her Majesty's Privy Council, to be the Referee.

"Article 2 of the Agreement refers to the Proclamation issued by the Ruler of Qatar on the 8th June, 1949, claiming jurisdiction and control over an area of the sea-bed and subsoil lying beneath the high seas of the Persian Gulf contiguous to the territorial waters of Qatar, states that he is satisfied that in respect of such area no prior obligation exists towards an individual or Company, and grants to the Company in conformity with this Agreement for a period of sixty five years from the date of signature hereof, the sole and exclusive right to explore for, drill for, develop, produce, transport and dispose of oil and/or gas or other kindred substances within the area described in Article 3. The Article ends by saying: " It is understood and agreed that this Agreement is subject to any rights which may be established under an existing concession in accordance with the machinery provided for in said concession." The concession referred to relates to an Agreement made by the Ruler in 1935 with another Company, to which I will refer later.

"Article 3 states that:

' The area covered by the exclusive rights described in Article 2 shall include all of the sea-bed and subsoil underlying the waters of the Persian Gulf which fall within the jurisdiction and control of the Ruler of Qatar and which lie beyond the territorial waters, contiguous to the mainland and islands of Qatar.'

"Article 4 states:

' On the date of signature of this Agreement, the Company shall pay to the Ruler the sum of Rupees 500,000. No part of this amount shall be returnable under any circumstances whatever.'

"Article 5 states:

' The Company shall pay to the Ruler annually the sum of Rupees 1,000,000, the first payment to be made one year after the date of signature of this Agreement. Upon discovery of oil in commercial quantities this annual rental shall cease, but the amount payable thereafter to the Ruler as Royalty under the terms of Article 8 hereof shall in no circumstances be less than the sum of Rupees 1,000,000 annually. For this purpose calculations shall be made on the expiry of each period of twelve months from the date of signature of this agreement. When oil is discovered in commercial quantities in the concession area the Company shall, if the Ruler so desires, make a loan to him of Rupees 1,000,000. The Company shall have the right to recover such loan by deduction from up to one half of the royalties accruing thereafter to the Ruler, provided that the amount paid to the Ruler in any one year shall not in consequence be reduced below the sum of Rupees 1,000,000 as provided above.'

" The Principal Agreement defined ' discovery of oil in commercial quantities ' as ' the time when a well or wells are drilled, tested and found capable of producing no less than 15,000 barrels of oil of satisfactory quality per day, for thirty consecutive days, according to good oil field practice '.

" The Principal Agreement was drawn up in Arabic and in English. Article 30 stated that:

' This Agreement has been written in the Arabic and English languages, each of which has equal validity, but is understood that the Ruler will refer to the Arabic text '.

Apart from some expert evidence as to the meaning of two words used in the Arabic text in the 4th and 5th Articles, it was not suggested that the meaning of the words of the two texts was substantially different. Mr. Anderson, an expert in Islamic law, who gave evidence before me and whose evidence I accept, stated that the Arabic word for ' sum ' in the first sentence of Article 5 was ' ijar ' and meant an annual rental, and was different from the Arabic word ' mablagh ' used for the word ' sum ' in Article 4. But he said that in the second paragraph of Article 5 the Arabic word ' mablagh ' is used for the words in English ' annual rental '. I do not therefore attach importance to the precise words ' an annual rental ' or ' sum '. I think that the parties, when they used these words in Arabic or English, had not in their minds their precise legal connotation, either in Arabic or English or American law. The way in which the two words were used indifferently in Article 5 in the Arabic and English texts indicates that this view is right.

" The crucial issue on this Arbitration was whether the parties intended that the first payment of Rupees 1,000,000 to be made one year after 5th August, 1949, was to be a payment in respect of the year 5th August, 1949, to 5th August, 1950, or a payment in respect of the year 5th August, 1950, to 5th August, 1951. The Claimant argued that this sum of Rupees 1,000,000 which was payable on each 5th August was in the nature of rent for the past twelve months, whereas the Respondent Company argued that the sum was a payment for the future twelve months. The Company denied that the Principal Agreement constituted a lease, and described it as a licence with an interest. I do not think it is essential, in deciding this dispute, to decide whether the Agreement created a lease or a licence with an interest. I think that the parties to the Agreement meant the words used in the Principal Agreement to have no special legal significance, save what one could fairly construe from their use, and the whole context of the Agreement.

" Before considering the crucial question at issue and some minor questions which require decision, I will state the material facts about the making of the Principal Agreement, and the Supplemental Agreements, and the way in which the dispute arose. I will refer only to those facts which, in my opinion, are admissible as evidence on the issues in dispute.

" Firstly, the right of the Ruler to make the concession in the Principal Agreement was decided in the Ruler's favour on 27th March, 1950. The material facts on this point were that on the 17th May, 1935, the Ruler, as Shaikh of Qatar, made an Agreement with the Anglo-Persian Company by which he granted to the Company for 75 years the sole right throughout Qatar to explore, etc., and sell petroleum and other products. In 1946 the Anglo-Persian Company assigned its rights under this Agreement to Petroleum Development Qatar Limited, referred to hereafter as P.D.Q. At some date prior to the early part of 1949, the Ruler was approached by a Mr. Carlton Wood, as agent of Superior Oil Company, who made a provisional offer to him in a written document. Save in so far as the Principal Agreement was affected by collateral agreement, this written document was substantially the same as the Principal Agreement.

" On the 8th June, 1949, the Ruler issued the Proclamation referred to in Article 2 of the Principal Agreement, and which I have set out. Two days earlier, P.D.Q. notified the Ruler of their intention that the sole prospecting rights conferred on them by the Agreement in May, 1935, covered *inter alia* the land lying under the high seas of the Persian Gulf outside the territorial waters of Qatar. In other words, they claimed to have the sole rights which the Ruler was negotiating to grant to the parties of the second part in the Principal Agreement.

" On the 25th June, 1949, Shaikh Saleh Assuleman Al Mana, who is described in the Principal Agreement as the Head of His Excellency the Ruler's Representative Office, wrote a letter to the parties of the second part, of which the material parts for the purpose of this Arbitration are as follows:

' After reading a copy of the Agreement which has been type-written, I thought it better to call your attention to certain remarks, which must be pointed out, in order to avoid some difficulties which might lead to long arguments. You will no doubt remember that after you read the articles of this Agreement to the Ruler, he made certain remarks which were accepted by you at the time, and it was agreed that they would be put down in a special supplement which will be added to the agreement. The points are the following:—1. After discovery of oil in commercial quantities, and the agreed annual payment of Rupees 1,000,000 ceases, the Company shall pay annually the sum of 300,000 Rupees to the grandchildren of the Ruler. [Then follow some clauses about the selection of lands by the Respondent Company, and the provision of guards, which are immaterial here.] These are the points which occur to me, and the Ruler has called my attention to them whenever I saw him. You can put these points in any language you like, provided they give the same sense.'

" Surely a good opportunity arose here for the parties to put in this supplemental agreement that the agreed annual payment of Rupees 1,000,000 was to be paid in advance. This was not done, and Sir Hugh Weightman and Mr. Allan in reply sent a letter to the Ruler in which they said:

' Your Representative has communicated to us today your verbal instruction in regard to the provision which you wish to be made for the male children of your sons. . . . Your instructions are as follows:— 1. Up until the date on which the royalty reaches the sum of Rupees 1,000,000 yearly, the whole royalty shall be paid to the Ruler (provided that the annual sum of Rupees 1,000,000 due to the Ruler shall not cease to be paid until the amount of royalty exceeds Rupees 1,000,000 as provided in the Agreement).'

This is a clear statement that the Ruler is to receive an annual sum of Rupees 1,000,000, and unless the payment under Article 4 is intended to be in the nature of payment for the year August 1949/August 1950, or unless it is clear that the intention of the parties was that the Ruler was to have no payment in respect of that year, it seems to me that the parties intended the Ruler to receive Rupees 1,000,000 in respect of that year.

" On the 25th June, 1949, Sir Hugh Weightman and Mr. Allan paid the Ruler Rupees 250,000, and submitted a document to him for his signature which included these words:

'This document witnesses that Sir Hugh Weightman and Robert Morton Allan Jr. have tendered and that His Excellency Shaikh Abdulla bin Qasim al Thani, Shaikh of Qatar, has accepted the sum of Rupees 250,000 in earnest of their joint intention to conclude the conditional concession agreement already negotiated between them, subject to such amendments as may be required in accordance with the advice and instructions of His Majesty's Government. This payment shall be regarded as payment in advance of one-half of the signature payment stipulated in the conditional concession agreement reached between the parties, and as such, is not recoverable.'

There was no dispute that this payment refers to the sum mentioned in Article 4 of the Principal Agreement.

" On the 5th August, 1949, Sir Hugh Weightman and Mr. Allan paid the Ruler Rupees 450,000, making a total payment of Rupees 700,000, of which Rupees 250,000 is allocated to the payment due under Article 4, and the remaining Rupees 200,000 was paid to satisfy the demand of the Ruler before he would sign the Principal Agreement.

" On the same day they also submitted to the Ruler for his signature this document:

'Received from Sir Hugh Weightman on behalf of the Central Mining and Investment Corporation Ltd. and Robert M. Allan Jr. on behalf of The Superior Oil Company this day the sum of Rupees 450,000, being in part the balance of the signature payment provided in Article 4 of the Concessional Agreement signed today, and in part an additional payment of Rupees 200,000 which they have agreed to make to me on signature of the Agreement.'

" Without doubt I think that the sum of Rupees 500,000 paid under Article 4 was paid as a premium for the signature of the Ruler to the Principal Agreement. Assuming that the Ruler had not already assigned these rights to P.D.Q., they were a valuable concession for which there might be strong competition. I am also satisfied, after comparing Article 4 with Article 5, that the parties did not intend this payment of Rupees 500,000 to be in the nature of rent for the conditional right to drill, etc., for oil during the next twelve months, *i.e.*, from August, 1949, to August, 1950.

" On the 5th August, 1949, Sir Hugh Weightman and Mr. Allan signed yet another document:

> ' It has been agreed by Sir Hugh Weightman on behalf of The Central Mining and Investment Corporation Ltd. and by Mr. Robert M. Allan Jr. on behalf of the Superior Oil Company, with His Excellency Shaikh Abdulla bin Qasim al Thani that the aforesaid companies shall pay all of the Ruler's costs in the arbitration between the Ruler and Petroleum Development (Qatar) Ltd. in the dispute which has arisen between him and that company, in respect of the latter's claim on the seabed and subsoil appertaining to the Shaikhdom of Qatar both within and outside territorial waters. It is also agreed that sums which may be paid to the Ruler under Article 5 of the Agreement signed by the parties on this date shall not be recoverable. In consideration of the above the Ruler undertakes to give his utmost co-operation in the preparation and presentation of his case in the arbitration aforesaid.'

The sums under Article 5 herein referred to were agreed to be the annual payments of Rupees 1,000,000 and not the payments by way of royalties or loan.

" The dispute between the Ruler and P.D.Q. was heard at Qatar in February, 1950, and on the 27th March, 1950, the majority of the Arbitrators (Lord Radcliffe being the third Arbitrator or Referee) decided that the concession did not include the sea bed or subsoil or any part thereof beneath the high seas of the Persian Gulf contiguous with the territorial waters of the State of Qatar.[1] In other words the Ruler had not, by his Agreement in 1935, deprived himself of his right to enter into the Principal Agreement. In the result the Respondent Company was entitled to proceed to exercise all their rights conferred on them by the Principal Agreement from the date of the Award, *viz.* 27th March, 1950.

" On the 2nd August, 1950, Rupees 1,000,000 were sent to the Claimant with a document which contained these words:

> ' I, Shaikh Ali bin Abdulla Al-Thani Ruler of Qatar declare by this receipt that I have this day received the sum of Indian Rupees 1,000,000 (One Million Indian Rupees) representing the first payment due to be made one year after the date of signature of the Concessional Agreement. . . .'

"Again, on the 5th August, 1951, a similar payment and a similar document was sent to the Claimant.

" The Company did not discover oil in commercial quantities, and on the 3rd May, 1952, by exercise of their rights under the Principal Agreement, gave notice in writing to the Claimant that it elected to terminate the agreement three months from the date of the notice, namely on the 3rd August, 1952. Article 25 of the Principal Agreement provided that:

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[1] See *International Law Reports*, 1951, Case No. 38.

'On termination of the Agreement by notice both the Ruler and the Company shall be free from further obligations except that (1) the Company shall pay all amounts due from it to the Ruler hereunder up to the actual date of termination.'

"On the 4th May, 1952, a meeting took place at Doha, the capital of Qatar, at which the Claimant, his adviser, Her Majesty's political adviser, and representatives of the Company were present, to discuss the Company's termination of the Agreement. In the course of this discussion the adviser of the Claimant stated that of course the Company would pay the Rupees 1,000,000 due on 5th August, 1952, to which the Company's representative replied that the Company had no intention of paying this money since it was not due until August 5th, and that on August 5th, 1952, the Concession Agreement would no longer be valid, and that it was on this basis that notice had been given more than three months in advance, so that a further payment would not fall due prior to termination.

"I accept the record kept by Mr. Paul Lower, who was present at the meeting and gave his evidence very fairly and clearly before me, as substantially accurate.

"I have now set out the evidence which was given on the Arbitration which seems to me directly relevant to the crucial point at issue, except that Mr. Paul Lower in his evidence before me said that Mr. Carlton Wood was replaced early in 1949 by Mr. Allan. Mr. Lower said that he had seen Mr. Allan in the United States after the Agreements with the Ruler had been signed by Mr. Allan and Sir Hugh Weightman, and that Mr. Allan had said to Mr. Lower that 'to submit an entirely different draft from that which Wood had submitted would have put unsurmountable stumbling blocks in the way of negotiating the concession'. Mr. Allan and Sir Hugh Weightman were subsequently killed in an air crash.

"There was no evidence of any discussion between the parties before the 4th March, 1952, as to whether the payment of Rupees 1,000,000 was to be a payment in advance or a payment in arrear. Mr. Lower, who is a member of the American Bar, said that he had prepared about 2,000 agreements for oil concessions in the United States and had seen a very large number of similar leases prepared by other persons, and that in every case there was an express provision that the rent should be payable in advance. 'It is common form, and you would not find a land owner who would take a lease unless it did so state.' He said that Mr. Allan was well aware of this practice.

"There is, however, no provision to this effect in the Principal

Agreement, although the English and Arabic texts of Article 5 refer to ' this annual rental ' ".

Held: that " on the true construction of the Principal Agreement of the 5th August, 1949, the Claimant is entitled to $\frac{364}{365}$th of Rupees 1,000,000 in respect of the period 5th August, 1951, to 3rd August, 1952, inclusive, as the apportioned part of the annual payment stipulated for in Article 5 of the Principal Agreement, together with interest thereon at 4 per cent., from the 5th August, 1952, until payment."

The Referee said: " In the absence of any stipulation to the contrary, it seems to me that ' the principles of justice, equity and good conscience ' on which the Respondent Company relies in their pleaded Answer require that the rent should not be payable in advance. It was admitted that, in Islamic Law, which is based on the principles of equity, rent always accrues in theory from second to second. Surely equity does not call on a tenant to pay a sum in advance for what he has not received, or to pay in advance for a chattel before it is delivered to him. In the absence of any other arrangements, payment and delivery should be concurrent.

" Some such principle seems to be the motive power which led the British Parliament to pass the Apportionment Acts. A passage from Hill & Redman's Law of Landlord and Tenant, 10th Edition, page 262, was cited to me wherein appear these words: ' Rent, whether reserved or made payable under an instrument in writing or otherwise, is considered as accruing from day to day and is apportionable in respect of time accordingly. (See the Apportionment Act, 1870, Section 2.) At Common Law there was no apportionment of rent in respect of time, since the rent only became payable on the expiration of the full quarterly or other period in respect of which it was reserved '. It is interesting to note that the Preamble to the Apportionment Act of 1870 states that rents and some other periodical payments are not at Common Law apportionable in respect of time, and for the remedy of some of the mischiefs and inconveniences thereby arising, etc., divers statutes have been passed, and it is expedient to make provision for the remedy of all such mischiefs and inconveniences etc.; and Section 2 of the Act states: ' From and after the passing of this Act all rents, annuities, dividends and other periodical payments in the nature of income . . . shall be considered as accruing from day to day and shall be apportionable in respect of time accordingly.'

" On this crucial point, therefore, I have come to the conclusion that unless there is anything in the documents which points the other way, I must decide that the annual payments of Rupees 1,000,000 under Article 5 were intended by the parties to be payments for the rights conceded to the Respondent Company in the preceding 12 months. But, on behalf of the Respondent Company, it was argued that the agreement by the Company that these payments should be irrecoverable pointed strongly to the interpretation that they were payments in advance. What would be the point, it was said, in stipulating that they shall be irrecoverable if they were intended to be payments in arrear? They would naturally be irrecoverable. This point impressed me, until the arbitrator for the Claimant pointed out that when the Principal Agreement was signed in August 1949 it was uncertain whether the Ruler had a legal right to make the grant, because of the earlier P.D.Q. Agreement in 1935. In the absence of this agreement about irrecoverability, if the Arbitrators decided against the Ruler in, say, September 1950, the Respondent Company might fairly have demanded repayments of the million rupees paid in August 1950 under Article 5 of the Principal Agreement and that whether the payment was in respect of the preceding or ensuing year. I do not know that this contention would have succeeded, but equity would seem to say so.

" Therefore, the Ruler, being acquainted with Islamic law and equitable principles, wished to make certain that the ' rent ' should not be recoverable in any event, and insisted upon the supplemental agreement signed on the 5th August, 1949. This supplemental agreement in terms refers to the impending arbitration between the Ruler and P.D.Q., and indicates that the Ruler had in his mind the possibility of a decision against him when he made this stipulation, and intended it to refer to such payments whether by way of rent in advance or in arrear.

" Moreover, it is difficult to see why this supplemental agreement was needed, apart from a possible adverse decision in the P.D.Q. Arbitration. Once a million rupees had been paid, whether in advance or in arrear, it would seem to be irrecoverable under normal conditions. It was the fear of what the decision in the P.D.Q. Arbitration might be which, in my opinion, caused the Ruler to insist on these payments being irrecoverable, whether they were paid in advance or in arrear.

" Another point made on behalf of the Respondent Company was that the probabilities pointed to the payment of ' rent ' being in advance. I quote the actual words of the submission as they appear in the transcript, because they frame the point so clearly: ' It must be of the greatest possible importance and relevance to bear in mind that nobody knew whether the Shaikh had power to give the Company any rights. He did it subject to what was found to be the effect, so far as he was concerned, of any restrictions imposed upon him by the 1935 concession . . . Who, least of all an Eastern Ruler, approached by foreigners whom there was no particular reason to trust, so to speak, in such circumstances who would not be disposed to say to the person who came to him and asked for rights over his territory, who would not be disposed at once to say: " Yes, but I am going to be paid in advance because you are going to have the right to terminate. If it came to arbitration, and I lost, obviously you would not give me anything. Therefore, what you do give me now I am going to stipulate should be a payment in advance, and indeed irrecoverable." '

" On reflection I think the answer to this point is that the Ruler never in fact stipulated for payment of Rupees 1,000,000 per annum in advance, and that if the Ruler had suggested it, the Company would most probably not have agreed to it.

" On the other hand, a point against the view that the parties intended the 'rent' of Rupees 1,000,000 per annum should be paid in advance was that Article 5 stipulates that rent is to cease upon discovery of oil in commercial quantities. Assume for the moment that the dispute between the Ruler and P.D.Q. was not decided in the Ruler's favour until September, 1950: If in the preceding month he has been paid Rupees 1,000,000 as rent in advance, then during the ensuing period up to August, 1951, he will be drawing rent plus any sum which may be due to him as royalties, which is contrary to the clear intention of the parties to the Agreement. On the other hand, if the rent is payable in arrear, then this difficulty does not arise. When oil is discovered in commercial quantities, the daily accrual of rent ceases and the Ruler only gets the royalties, and, in addition, if they do not amount to Rupees 1,000,000 in any one year, the Company agrees to augment the Royalties by payment to the Ruler up to that amount.

" In my opinion the intention of the parties as regards the main outlines of the Principal and Supplemental Agreements is fairly plain: They are as follows:

" (1) 500,000 Rupees to be paid under Article 4 as premium and not to be recovered, whatever rights the Ruler may or may not have to make the concession. In addition another 200,000 Rupees as an inducement to the Ruler to make the concession.

" (2) An annual payment by way of 'rental' of Rupees 1,000,000 starting to run on 5th August, 1949, and the first payment to be made on 5th August, 1950. All such payments by way of rental to be irrecoverable.

" (3) The Company to have the right to terminate the Agreement at any time it desired, and on termination the Ruler and the Company to be free from further obligations, except that the Company are to pay all amounts due from it to the Ruler up to the actual date of termination. Article 25 enabled the Company to divest itself of liability to pay such part of the annual rental of Rupees 1,000,000 as corresponded to the time between the date of termination of the Agreement and the ensuing 5th August. This seems to me to be an equitable arrangement. It means in effect that the Company holds itself liable from day to day for a due proportion of the annual sum of Rupees 1,000,000, payable on the ensuing 5th August, with the proviso that the Company can terminate this liability by giving three months' notice.

" (4) On discovery of oil in commercial quantities this daily liability is to cease, to be replaced by the arrangement about Royalties, but the Ruler is always to receive a sum of not less than Rupees 1,000,000 annually.

" At the conclusion of the arguments, the Arbitrators submitted to me certain questions on which they asked for my decision. I need not set out the exact words of the questions, but merely give the gist of them.

" (1) The first question was whether the proper law to be applied in the construction of the Principal Agreement is Islamic law or the principles of natural justice and equity. On this point the remarks of Mr. Justice Hardy, a Member of the Supreme Court of Oklahoma, in the case of *Bearman* v. *Dux Oil Co.*, decided in 1917, and quoted to me, are apt. The case concerned an oil concession, and Mr. Justice Hardy, in the course of his judgment, said:

' On the construction of contracts, it is the duty of the Court to place itself as far as possible in the situation of the parties at the time their minds met upon the terms of the agreement, and from a consideration of the writing itself ascertain their intention, and if this cannot be done by the instrument itself, the circumstances under which it was made and the subject matter to which it relates may be considered, and with these aids, it is the duty of the Court so to interpret the contract as to give effect to the mental intention of the parties as it existed at the time of contracting, so far as that intention is ascertainable and lawful.'

" There is nothing in the Principal or Supplemental Agreements which throws a clear light upon the intention of the parties on this point. If one considers the subject matter of the contract, it is oil to be taken out of ground within the jurisdiction of the Ruler. That fact, together with the fact that the Ruler is a party to the contract and had, in effect, the right to nominate Qatar as the place where any arbitration arising out of the contract should sit, and the fact that the agreement was written in Arabic as well as English, points to Islamic law, that being the law administered at Qatar, as the appropriate law.

" On the other hand, there are at least two weighty considerations against that view. One is that in my opinion, after hearing the evidence of the two experts in Islamic law, Mr. Anderson and Professor Milliot, ' there is no settled body of legal principles in Qatar applicable to the construction of modern commercial instruments ' to quote and adapt the words of Lord Asquith of Bishopstone, in his Award[1] as Referee in an Arbitration in 1951 in which the Shaikh of Abu Dhabi, a territory immediately adjacent to Qatar and in fact much larger than Qatar, was a party, and the

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[[1] See *International Law Reports*, 1951, Case No. 37.]

Arbitration concerned the interpretation of words in an oil concession contract. I need not set out the evidence before me about the origin, history and development of Islamic law as applied in Qatar or as to the legal procedure in that country. I have no reason to suppose that Islamic law is not administered there strictly, but I am satisfied that the law does not contain any principles which would be sufficient to interpret this particular contract.

" Arising out of that reason is the second reason, which is that both experts agreed that certain parts of the contract, if Islamic law was applicable, would be open to the grave criticism of being invalid. According to Professor Milliot, the Principal Agreement was full of irregularities from end to end according to Islamic law, as applied in Qatar. This is a cogent reason for saying that such law does not contain a body of legal principles applicable to a modern commercial contract of this kind. I cannot think that the Ruler intended Islamic law to apply to a contract upon which he intended to enter, under which he was to receive considerable sums of money, although Islamic law would declare that the transaction was wholly or partially void. Still less would the Ruler so intend, and at the same time stipulate that these sums when paid were not to be repaid under any circumstances whatever. I am sure that Sir Hugh Weightman and Mr. Allan did not intend Islamic law to apply. In my opinion neither party intended Islamic law to apply, and intended that the agreement was to be governed by 'the principles of justice, equity and good conscience' as indeed each party pleads in Claim and Answer, alternatively to Islamic law, in the case of the Claimant.

" It is interesting to note that in the Agreement which the Ruler made on the 17th May, 1935, to which I have referred, there is this express stipulation:

> 'The Shaikh and the Company declare that they base action upon this Agreement on the basis of good faith and pure belief and upon the interpretation of this Agreement in a manner consistent with reason.'

" (2) Having decided that Islamic law does not govern the Principal Agreement, the question whether the Principal Agreement is void within the 'jurisdiction' of the Arbitration does not arise.

" (3) So also the question whether the Principal Agreement is void under Islamic law does not arise on my decision that Islamic law does not apply.

" (4) The next question is how far (whatever is the proper law of the Principal Agreement) is it permissible to take into account in construing the Principal Agreement, the documents and facts relied on in paragraphs 5, 6, 7 and 10 of the Answer ? My answer to this question is that it is permissible to do so except for the document referred to in paragraph 7 and such documents in paragraph 10 as refer to payments made by the Company to the Representative of the Ruler under the arrangements referred to in paragraph 7.

" The next question is this: (5) Construing the Principal Agreement according to the proper law and in the light of such matters, if any, referred to in Question 4 as can properly be taken into account: (a) What is the nature of the Principal Agreement ? My answer to this question is that it was intended by the parties to be in the nature of a lease, but strictly speaking according to English law it was more properly described as a licence with an interest. It was also intended by the parties to be in the nature of an agreement for the joint participation in the profits of the sale of any oil obtained by the Company under the concession.

" (b) Were the fixed annual payments referred to in Article 5 of the Principal Agreement payable in arrear or in advance ? My answer is that they were payable in arrear and subject to the right of the Company to terminate its liability in respect thereof after three months' notice.

" (c) If payable in arrear, were they apportionable in respect of time ? My answer is Yes. These sums were apportionable in respect of time according to the principles of Justice, equity and good conscience. I may here point out that the two expert witnesses called before me both agreed that Islamic law, although mediaeval in origin and development, laid down the principle of apportionment.

" Professor Milliot, the expert on Islamic law who was called by the Respondent Company, said in his evidence that in Islamic law it is normal that a payment made at the end of a year should be considered as a payment in arrear, and that a legal rent is apportionable day by day. The Muslim law, he said, is dominated by the idea of equity. Equity is the basis of Muslim law.

" (d) If they were payable in arrear as apportionable in respect of time, does Article 25 free the Company from liability to pay to the Shaikh the apportioned part of the annual payment in question ?

" This point was raised by the Representatives of the Respondent Company at the meeting of the parties to the Principal Agreement on May 4th, 1952, to which I have already referred. The record of the meeting states:

> ' It was further pointed out to the Adviser that, regardless of whether the million rupees was a payment in advance or in arrear, according to the terms of the Concession Agreement, it was not to be paid prior to August 5, 1952, in any case, and that, since it was an annual payment due on August 5, 1952, it would not be due (to) the Ruler by the Company prior to the termination date of the Concession Agreement; that, by the terms of the Agreement, the Company had the right to terminate the Agreement and be relieved of all further payments except payments of amounts due prior to the date of termination.'

" With due respect to the ingenious mind which first thought of this point, I think it rests upon a fallacy. The word in Article 25 is ' due ', not ' due and payable ', as the argument suggests. It may be that the word ' due ' is ambiguous in that it may mean 'due' only, or 'due and payable'. If it is a case to which the Apportionment Acts or the analogous principles of equity apply, then the word 'due' means 'due at the present time, payable on the date for which the contract stipulates'. Thus in this case the payment of a proportionate part of Rupees 1,000,000 became due three days before the date on which the Rupees 1,000,000 became payable. But because it became due on 3rd August, it did not cease to become payable on 5th August. It is for this reason that the Claimant does not claim Rupees 1,000,000 but a sum equal to $\frac{364}{366}$th of Rupees 1,000,000, that is say Rupees 994,535 due in respect of the period from the 6th August, 1951, to the 3rd August, 1952 (both inclusive)."

[Report: Unpublished.]

NOTE.—The above Award, which is not an international arbitration in the accepted meaning, has been included as being of interest for the increasing number of arbitrations between Governments and private companies and individuals. It is also of indirect interest for the interpretation of the conception of "general principles of law" as it occurs in Article 38 of the Statute of the International Court of Justice.

Arbitration—Law Applicable—United States Claims Commission.

See p. 238 (*Schuetz Claim*).

iii.—The Arbitration Treaty. Appointment and Withdrawal of Arbitrators

Arbitration—Arbitration Treaty—Clause Conferring Jurisdiction in Respect of Claims "Based on a Treaty"—Meaning of Expression "Based on a Treaty"—Jurisdiction of Tribunal as Distinguished from Merits of Dispute—Compulsory Jurisdiction of International Court of Justice.

AMBATIELOS CASE (GREECE *v.* UNITED KINGDOM).

(*Merits in Obligation to Arbitrate.*)

International Court of Justice.

(Vice-President Guerrero, Acting President; President Sir Arnold McNair, Alvarez, Basdevant, Hackworth, Winiarski, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Sir Benegal Rau, Armand-Ugon, Judges; Spiropoulos, Judge *ad hoc.*)

Judgment of May 19, 1953.

THE FACTS (as stated by the Court).— "On April 9th, 1951, the Hellenic Government, in instituting proceedings against the United Kingdom of Great Britain and Northern Ireland with regard to a claim on behalf of Mr. Ambatielos, asked the Court to adjudge and declare: 'that the arbitral procedure referred to in the Final

Protocol of the Treaty of 1886 must receive application in the present case '. In the subsequent proceedings the Hellenic Government requested the Court itself to adjudicate upon the validity of the Ambatielos claim.

" By its Judgment of July 1st, 1952, the Court held that it had no jurisdiction to decide on the merits of the Ambatielos claim. It found at the same time that it had jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886.. [See *International Law Reports*, 1952, Case No. 96.]

" The question now before the Court is whether the United Kingdom is under an obligation to accept arbitration of the difference between that Government and the Hellenic Government concerning the validity of the Ambatielos claim as presented by the Hellenic Government, in so far as this claim is based on the Treaty of 1886.

" This case, quite unlike the case of the *Mavrommatis Palestine Concessions*, decided by the Permanent Court of International Justice in 1924, derives its distinctive character from the fact that the Court is called upon to decide, not its own jurisdiction over any particular dispute, but whether a dispute should be referred to another tribunal for arbitration.

" Both Greece and the United Kingdom have rested their case on the Declaration of 1926 and the Judgment of the Court of July 1st, 1952.

" The Declaration of 1926 reads as follows:

' It is well understood that the Treaty of Commerce and Navigation between Great Britain and Greece of to-day's date does not prejudice claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886 and that any differences which may arise between our two Governments as to the validity of such claims shall, at the request of either Government, be referred to arbitration in accordance with the provisions of the Protocol of November 10th, 1886, annexed to the said Treaty.'

" The Protocol of 1886 referred to in the Declaration of 1926 contains, *inter alia*, the following provision :

' Any controversies which may arise respecting the interpretation or the execution of the present Treaty, or the consequences of any violation thereof, shall be submitted, when the means of settling them directly by amicable agreement are exhausted, to the decision of Commissions of Arbitration, and the result of such arbitration shall be binding upon both Governments.'

" The Declaration of 1926 was agreed upon for the purpose of safeguarding the interests of the Parties with respect to claims on behalf of private persons based on the Treaty of 1886, for which, on the termination of that Treaty, and with it the Protocol, there would have been no remedy in the event of the failure of the two Governments to arrive at amicable settlements by direct means. While the controversies for which arbitration was provided in the Protocol were relatively more general in scope, those provided for in the Declaration are limited to claims on behalf of private persons based on the Treaty of 1886. But in both cases the Parties were prompted by the same motives and adopted the same method of arbitration.

" The operative part of the Court's Judgment of July 1st, 1952, is in the following terms:

' that it [the Court] is without jurisdiction to decide on the merits of the Ambatielos claim;

' that it has jurisdiction to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886 '.

" By that decision, the Court laid down two rulings. The first, negative in character, was that the merits of the Ambatielos claim are outside the jurisdiction of the Court. The second ruling, positive in character, assigned to the Court a limited jurisdiction in the Ambatielos case, namely, to decide whether the United Kingdom is obliged to accept arbitration, as requested by Greece. This limited jurisdiction of the Court is to be clearly distinguished from the jurisdiction of the Commission of Arbitration. In order to remove any possible doubt as to the respective spheres of action of the Court and of the Commission of Arbitration, the Court stated in its Judgment:

' The Court would decide whether there is a difference between the Parties within the meaning of the Declaration of 1926. Should the Court find that there is such a difference, the Commission of Arbitration would decide on the merits of the difference.' "

The relevant provisions of the Treaty of Commerce of 1886, invoked by Greece, are set forth in the *Held* below.

Held (by ten votes to four): that the United Kingdom was under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity, under the Treaty of 1886, of the Ambatielos claim.

The Court said: " The Court must refrain from pronouncing final judgment upon any question of fact or law falling within ' the merits of the difference ' or ' the validity of the claim '. If the Court were to undertake to decide such questions, it would encroach upon the jurisdiction of the Commission of Arbitration. The task of the Court will have been completed when it has decided whether the difference between Greece and the United Kingdom with regard to the validity of the Ambatielos claim is or is not a difference as to the validity of a claim on behalf of a private person based on the provisions of the Treaty of 1886 and whether, in consequence, there is an obligation binding the United Kingdom to accept arbitration.

" The words ' in so far as this claim is based on the Treaty of 1886 ', used in the operative part of the Court's Judgment of July 1st, 1952, must be understood in the sense in which they were used. They are intended to indicate the character which the Ambatielos claim must possess in order that it may be the subject of arbitration in accordance with the Declaration of 1926. They do not mean that the Ambatielos claim must be found by the Court to be validly based on the Treaty of 1886. If such a meaning had been intended by the Court, it would not have decided that it was without jurisdiction to pass on the merits of the claim.

" The question whether there is a difference within the meaning of the Declaration of 1926 depends upon whether the claim as formulated by the Hellenic Government contains the elements required for arbitration as agreed upon by the Parties in that Declaration.

" The Hellenic Government states in its first submission that the Ambatielos claim does not *prima facie* appear to be unconnected with the provisions of the Treaty of 1886. The Court understands that this submission is intended as a reason for the principal submission of the Hellenic Government that the United Kingdom is under an obligation to accept arbitration. But the Court considers that the reason stated in such a negative form is not sufficient.

" The United Kingdom Government, on its part, contends that the Ambatielos claim is not a claim the substantive foundation of which lies in the Treaty of 1886. It maintains that, before the Court can decide upon arbitration, it is necessary to determine, by way of interpreting the Declaration of 1926 and as a substantive issue, whether the claim is actually or genuinely based on the Treaty of 1886, in the sense that the facts alleged by the Hellenic Government, if true, would constitute a violation of that Treaty.

" The Court cannot accept this contention. It would necessarily lead to passing on a point which constitutes one of the principal elements of the Ambatielos claim and consequently to the substitution of the Court for the Commission of Arbitration. The Court cannot substitute itself for the Commission of Arbitration. The question of violation or non-violation of the Treaty of 1886 goes to the very roots of the Ambatielos claim. To decide whether the facts alleged by the Hellenic Government, if true, would constitute an actual violation of the Treaty of 1886 would be to pass upon ' the validity of the claim ' and ' the merits of the difference ', which are reserved exclusively for the Commission of Abritration, and concerning which this Court, according to its own earlier Judgment, is without jurisdiction. It cannot be assumed that the Declaration of 1926 contemplates that the verification of the allegations of fact of the Hellenic Government should be the duty of the Commission of Arbitration, while the determination of the question whether the facts alleged constitute a violation of the Treaty of 1886 should form the task of another tribunal. Such a division of functions would imply a division of the merits of the claim, which is authorized neither by the Declaration nor by the previous Judgment of this Court.

" The Declaration of 1926 was, as previously stated, agreed upon to ensure that the method of arbitration provided for in the Protocol of 1886 should be employed for the settlement of a limited category of differences concerning the Treaty of 1886, namely, differences as to the validity of claims on behalf of private persons based on that Treaty. At the time of the signature of the Declaration, it could hardly have entered the minds of the Parties that before arbitration should be in order, the Party requested to accept that procedure might insist that the question whether a claim was genuinely based on the Treaty of 1886 should first be examined and definitively settled by that Party itself or by an organ other than the Commission of Arbitration. It must have been their intention that the genuineness of the treaty basis of any claim, if contested, should be authoritatively decided by the Commission of Arbitration, together with any other questions relating to the merits of the claim, just as, before 1926, any question as to whether a certain controversy was concerned with the interpretation or execution of the Treaty of 1886 would have been settled by such a commission. If the Ambatielos claim had been referred to arbitration, it would have been for the Commission to decide whether the claim had a legal basis in respect of the Treaty of 1886. In the absence of any manifestation of a common intention of the Parties to the contrary, the Commission of Arbitration cannot be deprived of a part of its competence and no other body can be invested with the authority to determine definitively the validity of the treaty basis of the Ambatielos claim.

" For the purpose of determining the obligation of the United Kingdom to accept arbitration, the words ' claims . . . based on the provisions of the . . . Treaty of 1886 ' cannot be understood as meaning claims actually supportable under that Treaty. In the context in which the words occur, they can only mean claims depending for support on the provisions of the Treaty of 1886, so that the claims will eventually stand or fall according as the provisions of the Treaty are construed in one way or another. The fact that a claim purporting to be based on the Treaty may eventually be found by the Commission of Arbitration to be unsupportable under the Treaty, does not of itself remove the claim from the category of claims which, for the purpose of arbitration, should be regarded as falling within the terms of the Declaration of 1926.

" In order to decide, in these proceedings, that the Hellenic Government's claim on behalf of Mr. Ambatielos is ' based on ' the Treaty of 1886 within the meaning of the Declaration of 1926, it is not necessary for the Court to find—and indeed the Court is without jurisdiction to do so—that the Hellenic Government's interpretation of the Treaty is the correct one. The Court must determine, however, whether the arguments advanced by the Hellenic Government in respect of the treaty provisions on which the Ambatielos claim is said to be based, are of a sufficiently plausible character to warrant a conclusion that the claim is based on the Treaty. It is not enough for the claimant Government to establish a remote connection between the facts of the claim and the Treaty of 1886. On the other hand, it is not necessary for that Government to show, for present purposes, that an alleged treaty violation has an unassailable legal basis. The validity of the arguments presented by the Hellenic Government, as well as the validity of those presented by the United Kingdom Government, would be determined by the Commission of Arbitration in passing upon the merits of the difference. If the interpretation given by the Hellenic Government to any of the provisions relied upon appears to be one of the possible interpretations that may be placed upon it, though not necessarily the correct one, then the Ambatielos claim must be considered, for the purposes of the present proceedings, to be a claim based on the Treaty of 1886.

" In other words, if it is made to appear that the Hellenic Government is relying upon an arguable construction of the Treaty, that is to say, a construction which can be defended, whether or not it ultimately prevails, then there are reasonable grounds for concluding that its claim is based on the Treaty. This view seems to have been in the mind of Counsel for the United Kingdom when he said:

' . . . we are not, of course, suggesting that the Court must decide whether the claim is valid or not, that is to say, *well*-founded on the Treaty, for that would be a matter of the ultimate merits. . . . We do not suggest that the Court must consider whether the claim is " *bien fondée* ", but what we say is that it must at least consider whether the claim is " *fondée* ". . . .'

" The Court will use its power of appreciation to resolve the legal problem presented by the Parties, namely, whether the difference between them is of such a character as to come under the Declaration of 1926; but it cannot carry its power of appreciation to the extent of deciding the merits of the difference. In the opinion of the Court, this course of action would be in consonance with the intention of the Parties that all differences which might arise concerning the validity of claims on behalf of private persons based on the Anglo-Greek Commercial Treaty of 1886 should be referred to arbitration.

"The Court is not departing from the principle, which is well-established in international law and accepted by its own jurisprudence as well as that of the Permanent Court of International Justice, to the effect that a State may not be compelled to submit its disputes to arbitration without its consent; but it observes that, in this case, the question is whether the consent given by the Parties in signing the Declaration of 1926 to arbitrate a certain category of disputes, does or does not extend to the Ambatielos claim.

"The articles of the Treaty of 1886 invoked by the Hellenic Government are as follows:

'*Article I*

There shall be between the dominions and possessions of the two High Contracting Parties reciprocal freedom of commerce and navigation. The subjects of each of the two Parties shall have liberty freely to come, with their ships and cargoes, to all places, ports and rivers in the dominions and possessions of the other to which native subjects generally are or may be permitted to come, and shall enjoy respectively the same rights, privileges, liberties, favours, immunities and exemptions in matters of commerce and navigation which are or may be enjoyed by native subjects without having to pay any tax or impost greater than those paid by the same, and they shall be subject to the laws and regulations in force.

Article X

The Contracting Parties agree that, in all matters relating to commerce and navigation, any privilege, favour or immunity whatever which either Contracting Party has actually granted or may hereafter grant to the subjects or citizens of any other State shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party; it being their intention that the trade and navigation of each country shall be placed, in all respects, by the other on the footing of the most favoured nation.

Article XII

The subjects of each of the Contracting Parties who shall conform themselves to the laws of the country:

1. Shall have full liberty, with their families, to enter, travel, or reside in any part of the dominions and possessions of the other Contracting Party.

2. They shall be permitted to hire or possess the houses, manufactories, warehouses, shops, and premises which may be necessary for them.

3. They may carry on their commerce either in person or by any agents whom they may think fit to employ.

4. They shall not be subject in respect of their persons or property, or in respect of passports, nor in respect of their commerce or industry, to any taxes, whether general or local, or to imposts or obligations of any kind whatever other or greater than those which are or may be imposed upon native subjects.

Article XV

The dwellings, manufactories, warehouses and shops of the subjects of each of the Contracting Parties in the dominions and possessions of the other, and all premises appertaining thereto destined for purposes of residence or commerce shall be respected.

It shall not be allowable to proceed to make a search of, or a domiciliary visit to, such dwellings and premises, or to examine and inspect books, papers, or accounts, except under the conditions and with the form prescribed by the laws for subjects of the country.

The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.'

"The Hellenic Government, relying upon the most-favoured-nation clause contained in Article X, invokes Article 16 of the Treaty of Peace and Commerce between the United Kingdom and Denmark of February 13th, 1660-1661, which the Hellenic Government has quoted in English as follows:

'Each Party shall in all causes and controversies now depending, or hereafter to commence, cause justice and right to be speedily administered to the subjects and people of the other Party, according to the laws and statutes of each country without tedious and unnecessary delays and charges.'

"The Hellenic Government has invoked similar provisions of other treaties concluded between the United Kingdom and third States, that is to say:

—Article 24 of the Treaty of Peace and Commerce with Denmark of July 11th, 1670, providing that the Parties 'shall cause justice and equity to be administered to the subjects and people of each other';

—Article 8 of the Treaties of Peace and Commerce with Sweden of April 11th, 1654, and of October 21st, 1661, providing that 'In case the people and subjects on either part . . . or those who act on their behalf before any Court of Judicature for the recovery of their debts, or for other lawful occasions, shall stand in need of the Magistrate's help, the same shall be readily, and according to the equity of their cause, in friendly manner granted them . . .';

—Article 10 of the Treaty of Commerce with Bolivia, of August 1st, 1911, reserving the right to exercise diplomatic intervention in any case in which there may be evidence of ' denial of justice ' or ' violation of the principles of international law '.

" The United Kingdom Government, in the first place, questions the correctness of the English translations from the original Latin of certain of these provisions; and in the second place, it contends that Article X of the Treaty of 1886, dealing with matters of commerce and navigation, cannot be invoked to claim the benefits of provisions in other treaties concerning judicial proceedings, which, in the Treaty of 1886, form the subject of a separate article. The United Kingdom also advances a number of other arguments designed to show that the facts alleged by the Hellenic Government, if true, would amount to a denial of justice, and that an allegation of denial of justice must be based on general principles of international law and cannot be premised on Article X of the Treaty of 1886 dealing with commerce and navigation.

" On the other hand, the Hellenic Government has contended that a litigation arising out of a commercial contract may be considered as a matter relating to commerce and thus falling within the term ' all matters relating to commerce and navigation ' to which the most-favoured-nation clause in Article X of the Treaty of 1886 applies. The undertaking by the United Kingdom vis-à-vis third States that the courts shall administer ' justice and right ' or ' justice and equity ' in any litigation is regarded by the Hellenic Government as a ' favour ' which inures to the benefit of Greek nationals under the most-favoured-nation clause of Article X.

" With regard to the Anglo-Bolivian Treaty of 1911, the Hellenic Government argues that it imposes upon the United Kingdom, as well as upon Bolivia, the obligation to apply the principles of international law in the treatment of the nationals of the other contracting party.

"Article XV, paragraph 3, of the Treaty of 1886 provides for ' free access to the Courts of Justice '. The United Kingdom Government insists on a limited interpretation of the term ' free access ' and maintains that Mr. Ambatielos must be considered as having been fully accorded this right when he was permitted to appear in the English courts for the prosecution and defence of his rights on an equal footing with British subjects.

" The Hellenic Government, on the other hand, relies on a different interpretation of the term ' free access ' to the Courts of Justice and argues that the right of ' free access ' should be understood to include the prosecution of rights by the foreign litigant in the local courts free from restrictions imposed by the executive authorities. According to the contention of the Hellenic Government, Mr. Ambatielos did not enjoy ' free access ' to the courts, because of the ' withholding ' by the executive branch of the United Kingdom Government of evidence considered to be vital to his case.

" Having regard to the contentions of the Parties with respect to the scope and effect of the most-favoured-nation clause in Article X of the Treaty of 1886, as well as the divergence of views concerning the meaning of the expression ' free access to the Courts of Justice ' contained in Article XV, paragraph 3, of that Treaty; and bearing in mind especially the interpretations of these provisions contended for by the Hellenic Government, the Court must conclude that this is a case in which the Hellenic Government is presenting a claim on behalf of a private person ' based on the provisions of the Anglo-Greek Commercial Treaty of 1886 ', and that the difference between the Parties is the kind of difference which, according to the Declaration of 1926, should be submitted to arbitration.

"Accordingly, the Court must hold that the United Kingdom is under an obligation to co-operate with Greece in constituting a Commission of Arbitration, in accordance with the Protocol of 1886, as provided in the Declaration of 1926.

" There remain for consideration contentions advanced by the United Kingdom Government that, even assuming the facts alleged by the Hellenic Government to be true, the United Kingdom still is not obliged to submit to arbitration the difference as to the validity of the Ambatielos claim, for the following additional reasons:

(1) That Mr. Ambatielos did not exhaust local remedies;
(2) That there was undue delay in preferring the claim on its present alleged basis;
(3) That there were undue delay and abuse of the process of the Court in that, although reference of the dispute to the compulsory jurisdiction of the Court has been continuously possible since the 10th December 1926, no such reference took place until the 9th April 1951.

" With regard to the first two arguments, the Court need only observe that they are arguments in defence directed to the admissibility of the Ambatielos claim and are not in any way related to the question whether the claim is based on the Treaty of 1886. The points raised in these arguments are entirely outside the terms of the Declaration of 1926, which it is the Court's present task to interpret. For these reasons, the Court expresses no view concerning the validity or the legal effect of these arguments.

" These considerations also apply to the point of delay contained in the third argument. As regards the point of abuse of the process of the Court raised in that argument, the Court does not consider that the Hellenic Government did anything improper in instituting proceedings against the United Kingdom on April 9th, 1951, in conformity with the relevant provisions of the Statute and Rules of Court."

[Report: *I.C.J. Reports*, 1953, p. 10.]

In their Dissenting Opinions Sir Arnold McNair, President, and Judges Basdevant, Klaestad and Read said:

" To our great regret we are unable to concur in the Judgment of the Court. We must therefore indicate the way in which we understand the task of the Court in the present case, the meaning of the question submitted to it, the answer which should be given, and the grounds on which we base our opinion.

" By the Judgment of July 1st, 1952, in which the Court defined the limits of its jurisdiction in the Ambatielos case, it is now called upon to ' decide ', in accordance with the terms of that Judgment, ' whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, in so far as this claim is based on the Treaty of 1886 '. The Court must say whether or not there is an obligation, as so defined, binding upon the United Kingdom. In their final Submissions the Parties clearly recognized that this was the object of the Judgment now to be given by the Court. The Court, having found that it has jurisdiction for this purpose, is called upon to adjudicate upon the merits of the difference between the Parties as to the existence or non-existence of this obligation. As to the difference between the same Parties with regard to the validity of the Ambatielos claim, the Court has declared, in the Judgment mentioned above, that it has no jurisdiction to decide upon the merits of that difference.

" Having been required by the Application of the Hellenic Government to decide whether the United Kingdom is under an obligation to submit to arbitration, in accordance with the Declaration of 1926, the difference as to the validity of the Ambatielos claim, the Court, ' whose function is to decide in accordance with international law such disputes as are submitted to it ' (Article 38, paragraph 1, of the Statute), must for this purpose examine and take into account all legal factors which it deems relevant. There is no rule of law which limits this examination. The Court indeed lacks jurisdiction to adjudicate upon the validity of the Ambatielos claim; provided, however, that it confines itself to stating whether or not there exists an obligation to submit the difference as to the validity of that claim to arbitration, it will not trench upon the question of validity itself. If it be found that there is any point of law which is relevant to the solution of both these differences —which were clearly distinguished by the Judgment of July 1st, 1952— this cannot constitute a valid ground for the Court's refraining from examining that point and forming an opinion as to its importance for the purpose of determining whether an obligation to have recourse to arbitration exists in this case.

" The Court is called upon to say whether or not there exists an obligation to set up a Commission of Arbitration whose task it would then be to decide as to the validity of the Ambatielos claim. An affirmative reply to this question can be given only if the existence of this obligation can be established on a basis of law. Unless this can be established, it does not appear to us to be possible to give an affirmative answer to the question which the Court is required to decide. It is therefore necessary to examine all the factors susceptible of affecting the answer to be given to this question. It is only after such an examination, and in the light of what may emerge from it, that it will be possible to decide whether a Commission of Arbitration should be set up. It was in this way that the Court considered that the respective functions should be divided in a case—the *Interpretation of Peace Treaties*—which, apart from the fact that the Court had there before it a request for an advisory opinion, had much in common with the present case. The Court there pointed out that it had to give an opinion on the applicability to certain disputes of the procedure for settlement by means of Commissions instituted by the Peace Treaties, and not on the merits of these disputes. The same is true in the present case. The Court in that case itself considered the question whether the disputes which it found to exist ' were among those for which ' the Peace Treaties had provided a procedure for settlement. The Court found that the disputes in question related to the performance or non-performance of obligations arising from certain articles of the Peace Treaties. The Court made this finding without being hampered in any way by the jurisdiction of the Commission charged with the duty of deciding as to the validity of the allegations forming the subject-matter of the disputes. Having made this finding, it deduced therefrom an obligation on the States concerned to co-operate in the procedure for settlement prescribed by the Treaties. In our opinion, the Court in the present case must make a similar investigation in order to ascertain whether the conditions necessary for establishing an obligation to arbitrate are present.

" Similarly, in the Advisory Opinion relating to the *Interpretation of the Greco-Turk Agreement of December 1st, 1926*, the Permanent Court of International Justice, having been asked who was entitled to seise the President of the Greco-Turk Arbitral Tribunal of certain proceedings, gave its opinion on this question on the basis of the relevant provisions and did not leave it to the President of this Tribunal to deal with the point by deciding, in due course, whether he had been properly seised. Yet what was involved in that case was a question of the capacity necessary for the seising of an authority which already existed. When, as in the present case, it is a question of adjudicating upon the obligation to co-operate in setting up a body which would be called upon to make a decision at a later stage, the arguments in favour of a decision in advance on the question whether all the necessary conditions are satisfied appear to be still more convincing.

" There is no rule of law nor anything contained in Article 29 of the Treaty of 1926 which restricts the Court in the exercise of its jurisdiction to decide upon the existence of the obligation to arbitrate. It follows from this Article, in accordance with the interpretation given in the Judgment of July 1st, 1952, that the Court has jurisdiction to deal with any dispute as to the interpretation or application of the Declaration of 1926: this is the question which arises in ascertaining whether the arbitration clause contained in that Declaration is to be applied in the present case. Nothing contained in this Article or in the Declaration imposes any limitation on the power of the Court to consider any factor susceptible of affecting its judgment and, in particular, nothing therein contained directs it to surrender this examination to any other body. Provided the Court confines itself, in the operative part of its Judgment, to adjudicating upon the existence of the obligation to arbitrate, its power to consider the reasons determining its decision does not appear to us to be limited by the fact that a Commission of

Arbitration may be constituted for the purpose of deciding as to the validity of the Ambatielos claim.

" By the Declaration of 1926, the United Kingdom consented to the submission to arbitration of any difference with the Hellenic Government 'as to the validity' of 'claims on behalf of private persons based on the provisions of the Anglo-Greek Commercial Treaty of 1886'. On the question whether this provision is applicable to the 'difference as to the validity of the Ambatielos claim', the operative part of the Judgment of July 1st, 1952, added the following words: 'in so far as this claim is based on the Treaty of 1886'. This being the case, it is necessary to consider the meaning, which is in issue between the Parties, of the expression 'claims . . . based on the provisions of the Anglo-Greek Commercial Treaty of 1886', an expression which is contained in the Declaration and repeated in the Judgment.

" It is not enough for the Hellenic Government to invoke a provision of the Treaty of 1886 for the Ambatielos claim to be considered as 'based on the provisions of the . . . Treaty of 1886' within the meaning of the Declaration of 1926. There is nothing in the Declaration which authorizes either Party to the Treaty and Declaration of 1926 to impose its own subjective interpretation of this expression. The Declaration states it objectively, and the Court, which is empowered by Article 29 of the Treaty to interpret the expression, must determine in an objective way whether the claim presented under the Declaration is or is not based on the provisions of the Treaty of 1886.

" The arbitration clause, in the form in which it appeared in the Protocol of 1886, was open to the risk of becoming ineffectual in cases where it was invoked by one State and the respondent State alleged that the difference existing between them lay outside the scope of the provisions of the clause. The negative view of the respondent State was then sufficient to prevent the practical application of the clause. By the combined effect of the Declaration of 1926 and Article 29 of the Treaty of the same date, a remedy was provided for this defect in the arbitration clause: by this remedy the Court is empowered to decide this preliminary difference. The effect of this is that the opinion which will prevail will be that formed by the Court itself as to the character of the difference and, in the present case, on the question whether the claim which has been presented is or is not a claim based on the provisions of the Treaty of 1886.

" When the Permanent Court and the present Court have had to ascertain whether a dispute fell within the scope of an arbitration clause or a compulsory jurisdiction clause, these Courts have always considered that it was their duty first to determine the categories of disputes to which the clause in question was applicable and then to enquire whether the dispute in question fell within one of these categories.

" This is the consequence of a principle of international law which forms the basis of Article 36 of the Statute of the Court. In the *Eastern Carelia* Opinion, the Permanent Court invoked this principle, and declared that 'It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'. This principle was thereafter applied on a number of occasions by the Permanent Court, in particular in the cases concerning the *Mavrommatis Palestine Concessions*, *German Interests in Polish Upper Silesia*, the *Factory at Chorzów*, and the *Rights of Minorities in Upper Silesia*. That Court applied the principle with particular care when it had to decide the scope of an exception *ratione temporis* contained in a compulsory jurisdiction clause invoked before it in the *Phosphates in Morocco* case. The principle was also applied by the International Court of Justice in the *Corfu Channel* case, the *Interpretation of Peace Treaties* case and the *Anglo-Iranian Oil Company* case.

" In applying this principle for the purpose of deciding whether a given jurisdictional clause covered a given dispute which it was alleged could be submitted to it by virtue of the clause in question, the Permanent Court was not satisfied by a mere doubt resulting from weighty arguments presented before it, nor by *prima facie* considerations or considerations of a provisional character. In the *Mavrommatis Palestine Concessions* case, it invoked ' the fact that its jurisdiction . . . is invariably based on the consent of the respondent ', and it expressly stated that it ' cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate '. In the case concerning the *Factory at Chorzów*, after repeating that its jurisdiction ' is always a limited one, existing only in so far as States have accepted it ', the Court added:

> ' When considering whether it has jurisdiction or not, the Court's aim is always to ascertain whether an intention on the part of the Parties exists to confer jurisdiction upon it. The question as to the existence of a doubt nullifying its jurisdiction need not be considered when, as in the present case, this intention can be demonstrated in a manner convincing to the Court.'

" Before declaring a State to be bound to submit a dispute to the decision of an international tribunal, the Permanent Court and the present Court have always considered it necessary to establish positively, and not merely on *prima facie* or provisional grounds, that the State in question had in some form given its consent to this procedure. No distinction in this connection has been drawn between cases where the jurisdiction of the Court was involved and cases where that of some other tribunal or authority was in question.

" Since there is nothing in the Declaration of 1926 to indicate an intention that *prima facie* considerations should be regarded as sufficient, it is our opinion, based on the principle referred to above and the way in which this principle has been invariably applied, that the United Kingdom can only be held to be under an obligation to accept the arbitral procedure by application of the Declaration of 1926 if it can be established to the satisfaction of the Court that the difference as to the validity of the Ambatielos claim falls within the category of differences in respect of which the United Kingdom consented to arbitration in the Declaration of 1926.

" It is necessary therefore to examine the matter and, without prejudging the validity of the Ambatielos claim, to ascertain what claims the Declaration of 1926 was intended to refer to and whether the Ambatielos claim falls within the category of claims so determined.

" The claims referred to by the Declaration of 1926 are claims ' based on the provisions of the Treaty' of 1886. These words should be construed in their natural and ordinary meaning, as has been said over and over again and, in particular, in the Advisory Opinion of the Court on the *Competence of the General Assembly for the Admission of a State to the United Nations.* In our opinion, the natural and ordinary meaning of these words is limited to claims whose legal support is found in the provisions of the Treaty; that is, claims whose validity should be appraised in the light of these provisions; the natural and ordinary meaning of the words, in our opinion, excludes claims whose support must be sought elsewhere. In accordance with the method of interpretation adopted by the Court in the above-mentioned Opinion, we would add that nothing in the Declaration suggests that the Parties intended to confer any other meaning on these words.

" A reading of the Declaration as a whole confirms the view that the natural meaning of the words used corresponds to the purpose which the Parties had in mind. The Declaration begins with a clause whose purpose is to keep alive, in spite of the lapse of the Treaty of 1886, claims on behalf of private persons based on the provisions of that Treaty. This clause can only have a meaning, and can only have effect, in respect of claims legally based on the Treaty of 1886. It cannot be extended to cover claims in respect of which those provisions might be invoked without being really applicable. It was in the nature of things that this saving clause could only safeguard claims that had a legal basis in the Treaty of 1886. The arbitration clause in the Declaration of 1926 mentions expressly the claims referred to in the saving clause. It cannot extend to other claims.

" Thus, and by virtue of the express reference made by the Declaration to the Treaty of 1886, a difference concerning a claim on behalf of a private person comes within the scope of the arbitration clause of the Declaration of 1926 only if the examination of the claim demonstrates that it falls within the framework of the Treaty.

" In order to determine whether the arbitration clause in the Declaration of 1926 should be applied in the present case, we must ascertain whether the difference under consideration falls within the category of differences which the Parties have agreed to submit to arbitration.

" The sphere of application of the arbitration clause in the Declaration of 1926 has been defined by reference to the relevant law, namely, the provisions of the Treaty of 1886. This method has been frequently adopted in the drafting of arbitral or jurisdictional clauses.

" The method to be followed must therefore be to enquire whether the dispute as to the validity of the Ambatielos claim falls to be decided by the application of the provisions of the Treaty of 1886. This method was described by the Permanent Court in the *Mavrommatis Palestine Concessions* case as follows:

> ' For this reason the Court, bearing in mind the fact that its jurisdiction is limited, that it is invariably based on the consent of the respondent and only exists in so far as this consent has been given, cannot content itself with the provisional conclusion that the dispute falls or not within the terms of the Mandate. The Court, before giving judgment on the merits of the case, will satisfy itself that the suit before it, in the form in which it has been submitted and

on the basis of the facts hitherto established, falls to be decided by application of the clauses of the Mandate. For the Mandatory has only accepted the Court's jurisdiction for such disputes.'

" The same method was adopted by the Permanent Court in the *Phosphates in Morocco* case and by the present Court in its Advisory Opinion concerning the *Interpretation of Peace Treaties*. Having to decide whether the disputes under consideration were among those which were subject to the provisions of the Peace Treaties for the settlement of disputes by means of Commissions, the Court examined the subject-matter of the differences. It found that the disputes related ' to the question of the performance or non-performance of the obligations provided in ' certain articles of the Treaty, and it deduced from this finding that these disputes ' are clearly disputes concerning the interpretation or execution of the Peace Treaties ', and that furthermore the Governments concerned were bound to carry out the provisions of those articles in the treaties relating to the settlement of disputes by means of Commissions.

" We therefore have to consider whether the Ambatielos claim falls within the framework of the Treaty of 1886. In order to do this, it is necessary to examine the claim as it has been put forward, without enquiring whether the facts alleged are true or not, and to consider the provisions of the Treaty of 1886 which the Hellenic Government has invoked.

" The origin of the claim is to be found in a contract between Mr. Ambatielos and the British Ministry of Shipping for the sale of nine ships then under construction. Mr. Ambatielos has contended that this contract was not properly carried out by the seller, but this question of the breach of the contract is not one which has to be decided by international arbitration. It was submitted to English Courts by common accord of the Parties, as is stated in the British Note of 29th May 1933, and not disputed in the Hellenic answer of 3rd August 1933. The Admiralty Court gave judgment against Mr. Ambatielos, who appealed against this decision to the Court of Appeal but subsequently abandoned his appeal.

" The present claim, as formulated by the Hellenic Government, relates to the way in which justice was administered in the proceedings in the English Courts between Mr. Ambatielos and the Board of Trade as the successor to the Ministry of Shipping. It has been alleged, on behalf of the Hellenic Government, that officials of the Board of Trade wrongly failed to produce in the Admiralty Court all the evidence available and that this resulted in damage to Mr. Ambatielos. The Hellenic Government also complains of the refusal by the Court of Appeal of leave to Mr. Ambatielos to adduce new evidence. The difference existing between the Hellenic Government and the United Kingdom Government is therefore concerned with a claim based on alleged improper administration of justice, in particular with regard to the production of evidence in proceedings in the English Courts. The question for this Court is to decide whether the matter of complaint thus relied upon falls within the provisions of the Treaty of 1886. Without passing upon the truth of the facts relied on, and assuming them to be established, without moreover passing on the legal or illegal character of these facts, it is possible to determine whether this legal or illegal character is or is not dependent on the application of the provisions of the Treaty of 1886, and to decide, as a result of the view formed on this point, whether the claim based on these facts is or is not one which should be referred to arbitration in application of the Declaration of 1926. Such a decision, relating solely to the obligation to resort to arbitration, will not prejudge any decision to be given as to the validity of the Ambatielos claim, which is not within the jurisdiction of the Court.

" Is the claim of the Hellenic Government against the United Kingdom, the object of which has been thus defined, within the framework of the Treaty of 1886 ? The reply to this question must be in the affirmative before there can arise an obligation, in accordance with the Declaration of 1926, to submit the claim to arbitration. The provisions of the Treaty of 1886 invoked by the Hellenic Government must now be considered.

" The Hellenic Government invokes Article XV, paragraph 3, of the Treaty of 1886. This Article provides:

> ' The subjects of each of the two Contracting Parties in the dominions and possessions of the other shall have free access to the Courts of Justice for the prosecution and defence of their rights, without other conditions, restrictions, or taxes beyond those imposed on native subjects, and shall, like them, be at liberty to employ, in all causes, their advocates, attorneys or agents, from among the persons admitted to the exercise of those professions according to the laws of the country.'

" This Article promises free access to the Courts; it says nothing with regard to the production of evidence. Questions as to the production of evidence are by their nature within the province of the law of the Court dealing with the case (*lex fori*). The Treaty could have laid down certain requirements in this connection, but it did not do so. The free access clause frequently found in treaties, more commonly in the past than at the present, has as its purpose the removal, for its beneficiaries, of the obstructions, which existed in certain countries as the result of old traditions, to the right of foreigners to have recourse to the Courts. Its object is, as it states, to ensure free access to the Courts, not to regulate the different question of the production of evidence. An extensive interpretation of the free access clause which would have the effect of including in it the requirements of the proper administration of justice, in particular with regard to the production of evidence, would go beyond the words and the purpose of Article XV, paragraph 3. Free access to the Courts is one thing; the proper administration of justice is another. A distinction is traditionally drawn between the two as is shown, in particular, by the preparatory work of the 1930 Conference for the Codification of International Law (see in particular the Report of the Sub-Committee of the Committee of Experts for the Progressive Codification of International Law, League of Nations, C. 196. M. 70. 1927. V, pages 96-100 and 104; Observations of the Hellenic Government on this Report, pages 167-168, and Bases of Discussion Nos. 5 and 6 by the Preparatory Committee, League of Nations, C. 75. M. 69. 1929. V, Vol. III, pages 48 and 51).

"Finally, it is necessary not to lose sight of the fact that in this case the Court has to decide, on the basis of the meaning to be attributed to the free access clause, what is the extent of the obligation to arbitrate arising from the Declaration of 1926. With two interpretations of Article XV, paragraph 3, before us, we cannot subscribe to the one which would extend it to the production of evidence and thereby enlarge the obligation to submit to arbitration. It is particularly difficult to accept an interpretative extension of an obligation of a State to have recourse to arbitration. The Permanent Court in the *Phosphates in Morocco* case stated that a jurisdictional clause must on no account be interpreted in such a way as to exceed the intention of the States that subscribed to it. It went on to say with regard to the scope to be attributed to an exception *ratione temporis* contained in the compulsory jurisdiction clause invoked before it:

> 'it is necessary always to bear in mind the will of the State which only accepted the compulsory jurisdiction within specific limits, and consequently only intended to submit to that jurisdiction disputes having actually arisen from situations or facts subsequent to its acceptance'.

"The free access clause does not do more than provide for free access and for national treatment as regards conditions, restrictions, taxes and the employment of counsel. The complaint, as put before the Court in this case, does not allege that Mr. Ambatielos was refused access to the English Courts, or that he was denied national treatment as regards conditions, restrictions, taxes or the employment of counsel. The Hellenic Government merely alleges that the production of evidence was effected in a manner which in its opinion was defective and detrimental to its national. Article XV, paragraph 3, is unconnected with this complaint. If any legal rule has been broken, it is not a rule contained in this Article.

"In fact, when the Hellenic Government complains that the executive or judicial authorities of the United Kingdom have not acted according to the requirements of the proper administration of justice, it is alleging a violation of general international law. Can such a claim be considered to be based on a provision of the Treaty of 1886? At this stage we meet Article X of the Treaty of 1886 which has been invoked by the Hellenic Government. This Article contains a most-favoured-nation clause which, in its opinion, embodies certain references to the requirements of the proper administration of justice. But, having regard to its terms, Article X promises most-favoured-nation treatment only in matters of commerce and navigation; it makes no provision concerning the administration of justice; in the whole of the Treaty this matter is the subject of only one provision, of limited scope, namely, Article XV, paragraph 3, concerning free access to the Courts, and that Article contains no reference to most-favoured-nation treatment. The most-favoured-nation clause in Article X cannot be extended to matters other than those in respect of which it has been stipulated. We do not consider it possible to base the obligation on which the Court has been asked to adjudicate, on an extensive interpretation of this clause.

"The Hellenic Government has also invoked Articles I and XII of the Treaty of 1886 as a basis for its claim, but these Articles, like Article

X, are unconnected with the administration of justice. They throw no light on the question whether the evidence was properly or improperly produced in the English Courts. Nor do they permit an opinion to be formed as regards the complaint of improper performance of the contract or of unjust enrichment, even assuming that these complaints fall to be considered by an international tribunal.

"The difference as to the validity of the Ambatielos claim, in respect of which the Court has been asked to say whether it should be referred to arbitration in accordance with the Declaration of 1926, does not, therefore, appear to us to fall within the provisions of the Treaty of 1886 which have been invoked. A comparison between the object of the claim and the provisions of the Treaty thus leads us to the conclusion that the claim—whether it be justified or not—falls outside the scope of the arbitration clause in the Declaration of 1926.

"For these reasons, we consider that the Ambatielos claim does not fall within the category of claims in respect of which the United Kingdom has agreed to arbitration by the Declaration of 1926. Consequently the United Kingdom, in our opinion, is not under an obligation to submit this claim to the arbitral procedure provided for in that Declaration."

II.—Procedure

ii.—Competence. Competence to Determine Jurisdiction

Arbitration—Competence—Whether Jurisdiction of Claims Commission Ousted by Letter between Parties to Compensation Agreement Purporting to Exclude Claim from its Operation.

BINDER CLAIM.

United States, International Claims Commission.[1]

THE FACTS.—This was a claim by three United States nationals and one other person in respect of property worth some $4,012,500 taken by the Yugoslav Government. In a letter of July 19, 1948, addressed to the Yugoslav Ambassador by the United States Secretary of State, the claim was listed as one of a number deemed and understood to have been fully settled and discharged by reason of the Yugoslav Claims Agreement of the same date. The claimant contended that this letter was a "side agreement" to the Yugoslav Claims Agreement of 1948 and that the parties thereto specifically agreed that this claim would be allowed in its entirety, even though one of the four beneficial owners of the property taken was not a national of the United States at the time of the taking.

Held: that although the claim of the alien beneficial owner must fail, that of the three United States nationals must succeed.

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[1] The exact date of the decision does not appear from the Report as published in 1955. It would seem that the decisions of the Commission were given in the years 1951–1954.

For the establishment and functions of the Commission see *supra*, p. 211, n. 1.

The letter from the Secretary of State to the Yugoslav Ambassador could not be allowed to oust the jurisdiction of the Commission to adjudicate on the claim.

The Commission said: " [The Commission] does not view the letter as an agreement, nor as evidence of the intention of the United States and Yugoslav negotiators of the agreement that the claims listed therein be allowed as adjudicated claims. It is noted that the letter here involved prefaces the statement of understanding with the specific proviso:

> ' Without prejudice to the free exercise of such authority as may be vested in any agency that may be established or otherwise designated by the Government of the United States to adjudicate claims . . .'

" Despite this reservation to this Commission of the free exercise of authority and discretion, counsel for claimants takes the position that the Commission would have no jurisdiction other than to grant the claim. The legislative history of the International Claims Settlement Act of 1949, whereby Congress set up the procedures for adjudication of the Yugoslav claims, does not provide support for that position. In reviewing and explaining the claims agreement to the Members of Congress, Mr. Jack B. Tate, acting legal adviser, Department of State, said (pp. 7 and 13, *Hearings Before the House Committee on Foreign Affairs*, 81st Cong., on H.R. 4406):

> ' You must realize that these claims have in no way been adjudicated, and it is not anticipated that the claims, when adjudicated will be found valid to the extent of 100 percent of the amount claimed.'

" The International Claims Settlement Act of 1949 itself reserves to this Commission the sole responsibility for the adjudication of these claims:

> ' The action of the Commission in allowing or denying any claim under this act shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States, or by any court by mandamus or otherwise.'

" The Commission is directed, by that act, to apply the terms of the applicable agreement, utilizing such portions of the negotiating history of the agreement as it deems legally significant in the ascertainment of intent and meaning, and thereafter, if necessary to decision, to apply, in order, the applicable provisions of international law, justice and equity. The Commission utilized all of the foregoing criteria in its proposed decision on this claim and found no ground for departure from the traditional policy of our government with respect to the espousal of the claims of nonnationals."

[Report: *Settlement of Claims*, 1949–1955, p. 43.]

IV.—The Award

Arbitration—Award—Scope of Award—Whether Limited to Amount of Claim.

See p. 238 (*Schuetz Claim*).

Arbitration—Award—Scope of Award—Whether Limited to Amount of Claim.

See p. 239 (*Ketterer Claim*).

B.—INTERNATIONAL COURT OF JUSTICE

II.—Contentious Jurisdiction

i.—Competence

International Court of Justice—Jurisdiction of—Power to Determine Jurisdiction—Article 36 (6) of the Statute—Termination of Declaration of Acceptance of Compulsory Jurisdiction of the Court—Effect on Pending Cases.

Nottebohm Case (Liechtenstein *v.* Guatemala).

(*Preliminary Objection.*)

International Court of Justice.

(Sir Arnold McNair, President; Guerrero, Vice-President; Alvarez, Basdevant, Hackworth, Winiarski, Klaestad, Badawi, Read, Hsu Mo, Levi Carneiro, Armond-Ugon, Judges.)

Judgment of November 18, 1953.

The Facts (as stated by the Court).—

" On December 17th, 1951, the Government of the Principality of Liechtenstein filed an Application instituting proceedings before the Court against the Republic of Guatemala. This Application referred to the Declaration of January 27th, 1947, whereby the Government of Guatemala accepted the compulsory jurisdiction of the Court in accordance with Article 36 of the Statute; it also referred to the Declaration deposited on March 29th, 1950, with the Secretary-General of the United Nations, by which the Principality of Liechtenstein became a Party to the Statute of the Court, and to the Declaration dated March 10th, 1950, and deposited on March 29th, whereby the Government of Liechtenstein accepted the compulsory jurisdiction of the Court in accordance with Article 36 of the Statute. The Application stated that Mr. Friedrich Nottebohm was a national of Liechtenstein and that the Government of Guatemala had acted towards his person and property in a manner contrary to international law, and submitted the following claims:

' (*a*) that the Government of Guatemala has acted contrary to international law and has incurred international responsibility by the unjustified detention, internment and expulsion of Mr. Nottebohm and by the sequestration and confiscation of his property;

(*b*) that the Government of Guatemala is bound to restore to Mr. Nottebohm his movable and immovable assets as shown in the list appended to the Note of 6 July 1951;

(*c*) that the Government of Guatemala is bound to grant full compensation to Mr. Nottebohm in respect of such property as it is not in a position to restore to him owing to physical destruction or for other reasons;

(*d*) that the Government of Guatemala is bound to pay full compensation for the use of and profits derived from the sequestrated and confiscated assets and properties as well as for damage, depreciation and other losses sustained in respect of the said assets and properties as the result of or in connection with their sequestration or confiscation;

(*e*) that the Government of Guatemala is bound to pay full compensation for the unlawful detention and internment of Mr. Nottebohm as well as for preventing him, in a manner amounting to unjustified expulsion, from returning to Guatemala;

(*f*) that the Court shall determine the amount of compensation due to the Government of the Principality of Liechtenstein under (*c*), (*d*) and (*e*) above.'

" The Guatemalan Declaration of January 27th, 1947, was in the following terms:

' The Government of Guatemala declares that, in accordance with Article 36 (ii) and (iii) of the Statute of the International Court of Justice, it recognizes as compulsory, *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, and for a period of five years, the jurisdiction of the Court in all legal disputes. This declaration does not cover the dispute between England and Guatemala concerning the restoration of the territory of Belize, which the Government of Guatemala would, as it has proposed, agree to submit to the judgment of the Court, if the case were decided *ex æquo et bono*, in accordance with Article 38 (ii) of the said Statute.'

" The Declaration of Liechtenstein of March 10th, 1950, was in the following terms:

' The Government of the Principality of Leichtenstein, duly authorized by His Serene Highness, the reigning Prince François Joseph II, in accordance with the Order of the Diet of the Principality of Liechtenstein dated 9th March 1950, which came into force on 10th March 1950,

' declares by these presents that the Principality of Liechtenstein recognizes as compulsory *ipso facto* and without special agreement in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all disputes concerning:

(*a*) the interpretation of a treaty;

(*b*) any question of international law;

(*c*) the existence of any fact which, if established, would constitute a breach of an international obligation;

(*d*) the nature and extent of the reparation to be made for the breach of an international obligation.

'The present Declaration, which is made under Article 36 of the Statute of the International Court of Justice, shall take effect from the date on which the Principality becomes a Party to the Statute and shall take effect as long as the Declaration has not been revoked subject to one year's notice.'

"A communication signed by the Minister for Foreign Affairs of Guatemala, dated September 9th, 1952, and addressed to the President of the Court, was received in the Registry on September 15th, 1952, before the expiry of the time-limit fixed by the Order of March 7th, 1952, for the filing of the Counter-Memorial of the Government of Guatemala. This document, after referring to the Guatemalan Declaration of January 27th, 1947, and to certain Notes exchanged between the Ministry for Foreign Affairs of Guatemala and the Secretariat of the United Nations, which related to the date of the entry into force of the said Declaration, set out the following contentions:

'(*a*) That the Republic of Guatemala recognized the compulsory jurisdiction of the Court, but not in an absolute and general form, since this would have implied an indefinite submission to the detriment of its sovereignty and not in accordance with its interest, if by reason of unforeseen circumstances the international situation changed;

(*b*) That it accepted this recognition for a period sufficiently long to enable it, during this period, to elucidate and settle legal disputes which had arisen or which might arise, and sufficiently short to avoid the indefinite prolongation of a judgment or the submission of future questions, the genesis and circumstances of which could not be foreseen and would affect future governments and perhaps future generations of Guatemalans;

(*c*) That during the period of five years which began on January 27th, 1947, and expired on January 26th, 1952, as up to the present date there has not existed and does not exist any legal dispute, since Guatemala has not entered into any lawsuit contesting any claim;

(*d*) That the time-limit provided for in its Declaration of January 27th, 1947, expired with the last hour of January 26th, 1952, and that from this moment the International Court of Justice has no jurisdiction to treat, elucidate or decide cases which would affect Guatemala, except if Guatemala prolongs the duration of its declaration, submits itself by depositing a new declaration with the Secretary-General of the United Nations or signs a special protocol of submission with any other interested State;

(*e*) That in the absence of these last conditions, the Government of Guatemala is, much to its regret, unable for the moment to appear before the International Court of Justice in any given case.'

"The above-mentioned communication then argued that the power conferred on the Court by Article 36, paragraph 6, of its Statute, to determine disputes relating to its jurisdiction, was applicable only to questions as to whether a given dispute fell within the categories enumerated in paragraph 2 of that Article, and went on to make the following statements:

'I. That the Government of the Republic of Guatemala has taken note of the claim presented by the Government of the Principality of Liechtenstein on supposed official acts to the alleged detriment of Mr. Federico Nottebohm.

II. That this Ministry is quite willing to begin negotiations with the Government of the said Principality, with a view to arriving at an amicable solution, either in the sense of a direct settlement, an arbitration, or judicial settlement, with a preference for the last mentioned by means of the High Tribunal presided over by Your Excellency.

III. That in the present circumstances, since the jurisdiction of the International Court of Justice in relation to Guatemala has terminated and because it would be contrary to the domestic laws of that country, my Government is unable to appear and to contest the claim which has been made.

IV. That as a consequence, it cannot, for the time being, appoint an Agent in the case in question.

V. That the attitude of Guatemala is not one of default or of voluntary absence, but, on the contrary, is based on great respect for the domestic laws in force in our country and the need for enforcing them, and for the terms of the Statute of the Court and of the Guatemalan declaration of January 27th, 1947, formulated in accordance with the said Statute.

VI. That in no case should all or any part of this Note be considered as a reply, affirmative or negative, or a default or voluntary absence, but as a statement of its inability to appear before this High Tribunal.

VII. That the competent organs of my Government are at present studying the desirability and the terms of a new declaration of submission in conformity with the said Article 36, paragraphs (ii) and (iii), of the Statute of the International Court of Justice.

VIII. That in its case and as soon as this new declaration of submission is definitely approved by the competent organs of State with a view to accepting the compulsory jurisdiction of the Court, it will immediately deposit this declaration with the Secretary-General of the United Nations in order that it shall serve as a norm for jurisdiction in relation to Guatemala and the other States, on a basis of reciprocity, so far as new disputes, as well as those, if any, which were waiting to be dealt with or decided on January 27th, 1952, are concerned.

IX. And, finally, that notwithstanding the foregoing and while formulating the declaration referred to in the foregoing sub-paragraphs VII and VIII, this Ministry is perfectly willing to consider in agreement with any other interested State, the terms of a special protocol submitting to the Court any matter in controversy which may fall within the cases set out in Article 36, paragraphs (ii) and (iii), of the Statute of the International Court of Justice.'

Held (unanimously): that the Preliminary Objection of Guatemala must be rejected. The Court said:

[I. *Power of the Court to Determine its Jurisdiction.*—]" By challenging, in its communication of September 9th, 1952, the jurisdiction of the Court to deal with the claim which was the subject of the Application filed by the Government of Liechtenstein and by refraining in consequence from presenting a Counter-Memorial, the Government of Guatemala has raised a Preliminary Objection as it has recognized in its message of November 9th, 1953.

" The Court has, for the present, to examine only this Preliminary Objection, and this Judgment will be concerned with it alone. In its communication of September 9th, 1952, the Government of Guatemala set forth the considerations of fact and of law on which it based this Objection. The Objection was discussed by the Government of Liechtenstein in its Observations and in the arguments of its Agent and Counsel at the hearing on November 10th, 1953.

" In its communication of September 9th, 1952, the Government of Guatemala drew attention to the fact that the Declaration by which it accepted the compulsory jurisdiction of the Court had, in accordance with what was stated therein, ceased to be in force after January 26th, 1952; it stated that it therefore considered that the Court had no jurisdiction to deal with the case brought before it by Liechtenstein.

" The Government of Liechtenstein requests the Court to adjudicate upon this challenge of its jurisdiction. It contends that the Court is empowered to do so by Article 36, paragraph 6, of the Statute, which provides that:

' In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.'

" The Government of Guatemala, for its part, after stating that it originally contemplated asking the Court to adjudicate upon this point, added, in its communication of September 9th, 1952, that it had come to the conclusion that this course would not be practicable since it would be contrary to the Statute.

" The Government of Guatemala indeed considers that paragraph 6 of Article 36 only relates to disputes concerning jurisdiction in respect of the application of paragraph 2 of that Article, and that it is therefore confined to disputes for the solution of which it is necessary to ascertain whether the claim falls within one of the categories enumerated under letters *a*, *b*, *c* and *d* of that paragraph. But, it is pointed out by the Government of Guatemala, the question which must be decided at this stage is not whether the claim of Liechtenstein falls within one of these categories, but rather whether the expiry of the Declaration by which Guatemala accepted the compulsory jurisdiction of the Court has put an end to the Court's jurisdiction to deal with the claim of Liechtenstein.

" Paragraph 6 of Article 36 is drafted in the broadest terms; there is nothing in it to indicate the restriction which the Government of Guatemala seeks to introduce by means of an interpretation.

" Paragraph 6 of Article 36 merely adopted, in respect of the Court, a rule consistently accepted by general international law in the matter of international arbitration. Since the *Alabama* case, it has been generally recognized, following the earlier precedents, that, in the absence of any agreement to the contrary, an international tribunal has the right to decide as to its own jurisdiction and has the power to interpret for this purpose the instruments which govern that jurisdiction. This principle was expressly recognized in Articles 48 and 73 of the Hague Conventions of July 29th, 1899, and October 18th, 1907, for the Pacific Settlement of International Disputes, to which Guatemala became a Party. The Rapporteur of the Convention of 1899 had emphasized the necessity of this principle, presented by him as being ' of the very essence of the arbitral function and one of the inherent requirements for the exercise of this function '. This principle has been frequently applied and at times expressly stated.

" This principle, which is accepted by general international law in the matter of arbitration, assumes particular force when the international tribunal is no longer an arbitral tribunal constituted by virtue of a special agreement between the parties for the purpose of adjudicating on a particular dispute, but is an institution which has been pre-established by an international instrument defining its jurisdiction and regulating its operation, and is, in the present case, the principal judicial organ of the United Nations.

" Consequently, the Court has not hesitated to adjudicate on the question of its own jurisdiction in cases in which the dispute which had arisen in this respect went beyond the interpretation and application of paragraph 2 of Article 36. In the *Corfu Channel* case (Judgment of April 9th, 1949, *I.C.J. Reports* 1949, pp. 23–26 and 36), the Court adjudicated on a dispute as to whether it had jurisdiction to assess the amount of compensation, a dispute which related to the interpretation of a Special Agreement; in the *Ambatielos* case (Judgment of July 1st, 1952, *I.C.J. Reports* 1952, p. 28), the Court adjudicated upon a dispute as to its jurisdiction which related to the interpretation of a jurisdictional clause embodied in a treaty; in both cases the dispute as to the Court's jurisdiction related to paragraph 1 and not to paragraph 2 of Article 36.

"Article 36, paragraph 6, suffices to invest the Court with power to adjudicate on its jurisdiction in the present case. But even if this were not the case, the Court, ' whose function is to decide in accordance with international law such disputes as are submitted to it ' (Article 38, paragraph 1, of the Statute), should follow in this connection what is laid down by general international law. The judicial character of the Court and the rule of general international law referred to above are sufficient to establish that the Court is competent to adjudicate on its own jurisdiction in the present case.

" Consequently, the Court must ascertain and decide whether the expiry on January 26th, 1952, of the Declaration by which Guatemala accepted the compulsory jurisdiction of the Court has had the effect of depriving the Court of its jurisdiction to adjudicate on the claim stated in the Application, of which it was seised on December 17th, 1951, by the Government of Leichtenstein.

[II. *Effect of Expiry of Declaration of Acceptance.*—] " The Application was filed in the Registry of the Court on December 17th, 1951. At the time of its filing, the Declarations of acceptance of the compulsory jurisdiction of the Court by Guatemala and by Liechtenstein were both in force. Article 36 of the Statute and these Declarations determined the law governing the Application. In accordance with these Declarations, the Application was filed in sufficient time validly to effect the seising of the Court under Articles 36 and 40 of the Statute and Article 32 of the Rules.

" The Government of Guatemala has stated that, in conformity with what was said in its Declaration of acceptance of the compulsory jurisdiction of the Court, the effect of that Declaration came to an end on January 26th, 1952. It draws the conclusion that after that date the Court ceased to have jurisdiction to deal with a dispute affecting Guatemala and, consequently, to deal with the dispute which was the subject of the Application filed on behalf of the Government of Liechtenstein on December 17th, 1951. The latter Government does not contest the expiry of the Declaration of Guatemala but it does contest that the Court has, by reason thereof, become incompetent to deal with the dispute of which it had been seised.

" Guatemala is here putting forward a new interpretation of the effect attaching to the limited period (of five years) for which in 1947 it accepted the compulsory jurisdiction of the Court. It is new, in the first place, in the sense that it had never before advanced it. In particular, when on August 6th, 1947, it indicated to the Secretary-General of the United Nations that its Declaration was to be regarded as having come into force on the previous January 27th, it said nothing with regard to the effect which might attach to the expiry of the period in respect of which the Declaration was made.

" This interpretation is new also in the sense that it appears never before to have been advanced and, indeed, Guatemala has cited no authority in support of it.

" The Permanent Court of International Justice was on occasion confronted with a situation not unlike the present one, but it was never alleged by an interested party that the expiry of the period in respect of which a Declaration of acceptance of compulsory jurisdiction had been made, involved the removal from the Court's list of a case brought before the Court before the expiry of that period. This arose in the *Losinger* case and in the *Phosphates in Morocco* case, where the Parties confined themselves to raising other objections to the jurisdiction and against admissibility.

" The attitude of certain States in those cases does not, however, absolve the Court from the duty of examining whether the interpretation put forward is in fact a proper construction of the clause by which Guatemala limited the effect of its Declaration of January 27th, 1947, to a period of five years.

" In the Declaration which the Government of Guatemala deposited with the Secretariat of the United Nations on August 27th, 1952, a copy of which appeared in that Government's communication to the Court of September 9th, 1952, it is said that ' it was the definite intention of the Government of Guatemala that on the expiry of the period of five years during which it submitted to the compulsory jurisdiction of the Court, this submission should end automatically '. The Declaration of Guatemala of January 27th, 1947, makes it clear that this submission was to endure for a period of five years. There can be no doubt that an Application filed after the expiry of this period would not have the effect of legally seising the Court. But neither in its Declaration nor in any other way did Guatemala then indicate that the time-limit provided for in its Declaration meant that the expiry of the period would deprive the Court of jurisdiction to deal with cases of which it had been previously seised.

" This interpretation appeared for the first time in the communications of August 27th and September 9th, 1952. In the latter, the Government of Guatemala referred to the definition given by the law of Guatemala to the word ' jurisdiction ', namely ' the power of administering justice ', and it drew the conclusion that, since Guatemala had accepted the jurisdiction of the Court for a period ending on January 26th, 1952, the Court, after that date, no longer had the power of administering justice with reference to Guatemala.

" The Court is not concerned with defining the meaning of the word ' jurisdiction ' in general. In the present case, it must determine the scope and meaning of the Declaration made by Guatemala on the basis of Article 36, paragraph 2, a Declaration which, together with that provision and with the corresponding Declaration by Liechtenstein, contains the law governing the question under consideration. Article 36 determines the cases in respect of which the Court shall have jurisdiction. It indicates that the Court can deal with cases referred to it by agreement of the parties; and it determines the field of application of what has come to be called the compulsory jurisdiction of the Court. The characteristic of this compulsory jurisdiction is that it results from a previous agreement which makes it possible to seise the Court of a dispute without a Special Agreement, and that in respect of disputes subject to it, the Court may be seised by means of an Application by one of the parties. Paragraph 2 of Article 36 refers to the subject-matter of compulsory jurisdiction, the principle and application of which it governs in conjunction with Articles 32 to 35 of the Rules. It makes use, as do the Declarations relating to it, of the words 'compulsory' and 'jurisdiction', and the structure of the text is sufficient to show that of these two words the first is the more important. The purpose of Article 36, paragraph 2, and of the Declarations relating thereto, is to regulate the seising of the Court: under the system of the Statute the seising of the Court by means of an Application is not *ipso facto* open to all States parties to the Statute, it is only open to the extent defined in the applicable Declarations. This being so, the lapse of a Declaration by reason of the expiry, before the filing of the Application, of the period fixed therein makes it impossible to invoke that Declaration in order to seise the Court.

" The seising of the Court is thus dominated by the Declarations emanating from the parties when recourse is had to the compulsory jurisdiction in accordance with Article 36, paragraph 2. But the seising of the Court is one thing, the administration of justice is another. The latter is governed by the Statute, and by the Rules which the Court has drawn up by virtue of the powers conferred upon it by Article 30 of the Statute. Once the Court has been regularly seised, the Court must exercise its powers, as these are defined in the Statute. After that, the expiry of the period fixed for one of the Declarations on which the Application was founded is an event which is unrelated to the exercise of the powers conferred on the Court by the Statute, which the Court must exercise whenever it has been regularly seised and whenever it has not been shown, on some other ground, that it lacks jurisdiction or that the claim is inadmissible.

"At the time when the Application was filed, the Declarations of Guatemala and of Liechtenstein were both in force. The regularity of the seising of the Court by this Application has not been disputed. The subsequent lapse of the Declaration of Guatemala, by reason of the expiry of the period for which it was subscribed, cannot invalidate the Application if the latter was regular: consequently, the lapse of the Declaration cannot deprive the Court of the jurisdiction which resulted from the combined application of Article 36 of the Statute and the two Declarations.

" When an Application is filed at a time when the law in force between the parties entails the compulsory jurisdiction of the Court —which was the case between Guatemala and Liechtenstein on December 17th, 1951—the filing of the Application is merely the condition required to enable the clause of compulsory jurisdiction to produce its effects in respect of the claim advanced in the Application. Once this condition has been satisfied, the Court must deal with the claim; it has jurisdiction to deal with all its aspects, whether they relate to jurisdiction, to admissibility or to the merits.

An extrinsic fact such as the subsequent lapse of the Declaration, by reason of the expiry of the period or by denunciation, cannot deprive the Court of the jurisdiction already established.

"On the point here examined, the Government of Guatemala has referred in its communication of September 9th, 1952, to certain provisions in the laws of that country. The Government of Liechtenstein has made use of this in order to contend that the laws of Guatemala cannot take precedence over the rules of international law which are applicable to this case.

" The Court does not consider that Liechtenstein in this connection has given a correct interpretation of the view of Guatemala on this point. In the opinion of the Court, the Government of Guatemala, on the premise that the Court lacked jurisdiction in an absolute manner, meant that, by reason of the Court's lack of jurisdiction, the laws of Guatemala did not authorize that Government to be represented before a court which had no power to adjudicate. The Court does not consider it necessary to ascertain what the laws of Guatemala provide in this connection. It will confine itself to stating that, once its jurisdiction has been established by the present Judgment with binding force on the Parties, the difficulty, in which the Government of Guatemala considered that it had been placed, will be removed and there will be nothing to prevent that Government from being represented before the Court in accordance with the provisions of the Statute and Rules. This is, moreover, what that Government appears to have admitted in its communication of September 9th, 1952, No. 22, III, where the Minister for Foreign Affairs stated:

' That in the present circumstances, since the jurisdiction of the Court in relation to Guatemala has terminated and because it would be contrary to the domestic laws of that country, my Government is unable to appear and to contest the claim which has been made.'

" This interpretation is confirmed by the final sentence in the message of November 9th, 1953, which reads as follows:

' In case negative decision Court on objection proposed, Guatemala reserves right to be represented dispute and raise further objections.'

" The Court has come to the conclusion that the expiry on January 26th, 1952, of the five-year period for which the Government of Guatemala subscribed to a Declaration accepting the compulsory jurisdiction of the Court in accordance with Article 36, paragraph 2, of the Statute, does not affect any jurisdiction which the Court may have to deal with the claim presented in the Application of which it was seised on December 17th, 1951, by the Government of the Principality of Liechtenstein . . ."

[Report: *I.C.J. Reports*, 1953, p. 111.]

ii.—Procedure

International Court of Justice—Contentious Procedure—Evidence—Burden of Proof—Probative Value of Admissions of Title.

See p. 94 (*The Minquiers and Ecréhos Case*).

C.—CONCILIATION

Conciliation Commissions—Powers and Functions of—Sitting as Frontier Commission.

See p. 63 (*Frontier* (*Local Authorities*) *Award*).

PART XI

WAR AND NEUTRALITY

A—WAR IN GENERAL

I.—Definition and Technical Meaning of War. Belligerency and Insurgency.

War—Meaning of—Hostilities in Absence of Declaration of War —The Korean Conflict—The Term " War " in an Insurance Policy.

WESTERN RESERVE LIFE INSURANCE CO. *v.* MEADOWS.

United States, Court of Civil Appeals of Texas. March 6, 1953.
Supreme Court of Texas. October 7, 1953.

THE FACTS.—This was an action on five insurance policies, to each of which was attached a supplemental contract providing for the payment of an additional sum of $1,000 in the event of the death of the insured by accidental means except " if the Insured shall be in military, naval, or allied service in time of war at the date of the accident ". The insured was a lieutenant colonel in the United States Army, and was killed in the crash of a United States Army aeroplane in Alaska on August 23, 1951. The Korean conflict was then in progress. The insurer denied liability for the additional death benefits provided for in the supplemental contracts. The District Court gave judgment for $5,000, the total amount of the additional death benefits. On appeal,

Held (by the Court of Civil Appeals): that the decision of the District Court must be affirmed. The death of the insured did not take place in time of war. The conflict in Korea was not a war because Congress had not formally declared war on North Korea. [Report: 256 S.W. 2d 674.]

On appeal,

Held (by the Supreme Court of Texas): that the judgments of the District Court and Court of Civil Appeals must be reversed and judgment given that the plaintiff take nothing by her suit. The word " war " in the insurance contract must be taken in its plain, ordinary, and generally accepted meaning, and by that test the conflict in Korea was " war " in fact.

The Court said: " It is true that the Constitution, by Section 8 of Article I, gives to Congress ' Power . . . To declare War ', and that Congress has not in so many words by formal Act declared war against North Korea or against Communist China. There are, however, in many of the decisions, some of which are cited in the opinion of the Court of Civil Appeals and relied upon by respondent, statements to the effect that an Act of Congress which recognizes the existence of war or which is passed in aid or furtherance of existing war is in effect and meaning a declaration of war. For example, in *Bishop* v. *Jones and Petty*, 28 Tex. 294, 319, it is said:

'But still there can be no war by its government, of which the court can take judicial knowledge, until there has been some act or declaration creating *or recognizing its existence* by the department of the government clothed with the war-making power.' (Emphasis added.)

"The opinion of Justice Grier in the *Prize Cases* (*The Amy Warwick*), 2 Black. 635, 17 L.Ed. 459, 477, involving the question whether a war *de facto* between the states existed in 1861 prior to the formal declaration of war by Congress, contains the following:

'If it were necessary to the technical existence of a war that it should have legislative sanction, we find it in almost every Act passed at the extraordinary session of the Legislature of 1861, which was wholly employed in enacting laws to enable the government to prosecute the war with vigor and efficiency.'

"The opinion in *Pang* v. *Sun Assurance Co. of Canada*, 37 Hawaii 208, 218, after referring to several decisions by United States courts, says:

'Those cases are authority for the admitted proposition that no "formal" declaration is necessary to the creation of a "state of war", and that by making payment to the officers and men engaged on a war basis and other informal acts the Congress recognizes the existence of a "condition" of war.'

See also *Hamilton* v. *McClaughry*, C.C., 136 F. 445, 451; *Bas* v. *Tingy*, 4 Dall. 37, 1 L.Ed. 731, 733–734; *State of Virginia* v. *West Virginia*, 11 Wall. 39, 20 L.Ed. 67, 72–73; *Wharton* v. *Wise*, 153 U.S. 155, 38 L.Ed. 669, 676.

"When the United Nations, after the invasion of South Korea in 1950, called upon member nations to render assistance to repel the invasion, the United States promptly furnished its vigorous support, and combatant activities to which the armed forces of the United States were committed commenced in Korea on or about June 25, 1950, and continued without interruption to and including the date of the death of the insured, Benjamin Earle Meadows. Army, Navy, Marine Corps and Air Force personnel of the United States in great numbers participated in combat with the enemy forces of North Korea, and later with those also of Communist China. Congressional support of the action in Korea, which we know was in fact war on a large scale, was necessary, and was freely and generously given in many Acts of Congress by which provision was made for support of the armed forces employed, for increased military man power and equipment, and for economic stabilization.

Many of those Acts of Congress, including vast appropriations for the support of the armed forces in Korea, are referred to in the dissenting opinion of Chief Justice Vinson in the steel mill seizure case, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 96 L.Ed. 1153, 1215, 1216–1218, 26 A.L.R.2d 1378. Reference is there made to the one hundred thirty billion dollars appropriated by Congress for our armed defense and for military assistance to our Allies since the June, 1950, attack in Korea, to the Mutual Security Act of 1951, 22 U.S.C.A. § 1651 *et seq.*, to the grant by Congress of authority to draft men into the armed forces, to the increase in appropriations, to the Department of Defense, which had averaged less than thirteen billion dollars per year for the three years before the attack in Korea, to forty-eight billion dollars for the year 1951. There were other Acts of Congress recognizing the existence of war in Korea and enabling the government to prosecute it with vigor and efficiency, such as the Servicemen's Indemnity Act, 38 U.S.C.A. § 851 *et seq.*, a new GI Bill of Rights, 38 U.S.C.A. § 694 *et seq.*, the 1950 Amendment to the Revenue Act, 26 U.S.C.A. and again more appropriations. Those Acts were in acknowledgment of the fact of war in which the Nation was engaged. And to use the language of Justice Grier in his opinion in the *Prize* cases above quoted, if it is necessary to the technical existence of war that it have legislative sanction, the Acts of Congress above referred to gave that sanction.

"Decision of this case could well be placed on the ground that if the word 'war' used in the policies of insurance was intended to mean 'technical war', or 'legal war', that is, war declared by Congress, the Acts of Congress prior to the death of the insured should be considered in effect to amount to a declaration of war. We prefer, however, to meet squarely the very question presented, which is whether the word 'war' used in the phrase 'in time of war' in the policies means war in fact or means war declared by Congress.

"It is the settled law in this state that contracts of insurance in their construction are governed by the same rules as other contracts, and that terms used in them are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows them to have been used in a technical or different sense. *Hall* v. *Mutual Benefit Health & Accident Ass'n*, Tex.Civ.App., 220 S.W.2d 934, 936, application for writ of error refused; *Aetna Life Insurance Co.* v. *Reed*, Tex.Sup., 251 S.W.2d 150, 152–153; *National Security Life & Casualty Co.* v. *Davis*, Tex.Sup., 257 S.W.2d 943, 944.

"Undoubtedly there may be war or a state of war without a declaration of war by the department of government clothed with the war-making power. Justice Jackson, in his concurring opinion in the steel mills seizure case said: 'Of course, a state of war may in fact exist without a formal declaration.' *Youngstown Sheet & Tube*

Co. v. *Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 873, 96 L.Ed. 1153, 1202–1203, 26 A.L.R.2d 1378; Edwin Borchard, discussing under the title ' When Did the War Begin ', the decision of the United States Circuit Court of Appeals in *New York Life Insurance Company* v. *Bennion*, 10 Cir., 158 F.2d 260,[1] and other decisions, said: ' It is common knowledge that war may exist without a declaration thereof.' And on the authorities reviewed he expressed this conclusion: ' It thus appears that war may be deduced from the circumstances as a fact and may exist independently of a declaration by Congress.' 47 Columbia Law Review, pp. 742, 745, 748.

" Many definitions of war and many decisions reflect the common understanding of war as war in fact. The opinion in the *Prize Cases* (*The Amy Warwick*), 2 Black. 635, 17 L.Ed. 459, 476, quotes with approval a definition of war as ' That state in which a nation prosecutes its right by force.' In *Stankus* v. *New York Life Insurance Co.*, 312 Mass. 366, 44 N.E.2d 687, 688, 689,[2] the court said, citing authorities: 'A conflict between the armed forces of two nations under authority of their respective governments would be commonly regarded as war.' In the same opinion the court said that: ' The existence of a war is not dependent upon a formal declaration of war.' An early opinion by the Supreme Court of Maine contains the following:

> ' But every forcible contest between two governments, *de facto*, or *de jure*, is war. War is an existing *fact*, and not a legislative decree. Congress alone may have power to " declare " it *beforehand*, and thus cause or commence it. But it may be initiated by other nations, or by traitors; and then it *exists*, whether there is any declaration of it or not. It may be prosecuted without any declaration; or Congress may, as in the Mexican war, declare its *previous* existence. In either case it is the *fact* that makes " *enemies* ", and not any legislative Act.'

Dole v. *Merchants' Mutual Marine Ins. Co.*, 51 Me. 465, 470.

"American Jurisprudence thus defines war: ' War is an armed struggle or contest by force carried on for any purpose between two or more nations or states exercising at least de facto authority over persons within a given territory and commanding an army prepared to observe the ordinary laws of war.' 56 Am.Jur., p. 133, Sec. 2. Black's Law Dictionary definition is: 'An armed conquest between nations '; Webster's, ' The state or fact of exerting violence or force against another, now only against a state or other politically organized body.'

"Among cases holding that actual armed hostilities without a declaration mean ' war ' are the following: *Bas* v. *Tingy*, 4 Dall. 37, 1 L.Ed. 731 (hostilities on the high seas between public armed ships of the United States and armed vessels of France in 1799); The *Prize Cases* (*The Amy Warwick*), 2 Black. 635, 17 L.Ed. 459 (capture

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[[1] See *Annual Digest*, 1946, Case No. 94.]

[[2] *Ibid.*, 1941–1942, Case No. 135.]

by public vessels of the United States of ships attempting to run blockade of ports of Southern States established by proclamation of the President of the United States in April, 1861); *Arce* v. *State*, 83 Tex.Cr.R. 292, 202 S.W. 951; L.R.A. 1918 E, 358 (invasion of Mexico by United States troops under General Pershing and attack by Mexican troops on a troop of United States cavalry in Texas below Laredo); *Hamilton* v. *McClaughry*, C.C., 136 F. 445 (occupation of Chinese territory by United States military forces and conflicts between it and armed Chinese troops in the 'Boxer Uprising' in 1900); *New York Life Insurance Co.* v. *Bennion*, 10 Cir., 158 F.2d 260, certiorari denied, 331 U.S. 811, 67 S.Ct. 1202, 91 L.Ed. 1831[1] (attack by Japanese planes on Pearl Harbor and resistance by United States armed forces on December 7, 1941).

" Decisions involving the question whether and when war has ended are controlled by the same principle, that is, that war exists during the period of actual hostilities and ends with the cessation of those hostilities, even though there has been no treaty of peace or no declaration, proclamation or other official act announcing the termination of the existence of a state of war. In those cases the word 'war' is considered as used in the practical and realistic sense in which it is commonly used and understood rather than in a technical or formal sense. See *National Life & Accident Ins. Co.* v. *Leverett*, Tex.Civ.App., 215 S.W.2d 939; *Lincoln* v. *Harvey*, Tex.Civ.App., 191 S.W.2d 764; *New York Life Insurance Co.* v. *Durham*, 10 Cir., 166 F.2d 874[2]; *Kaiser* v. *Hopkins*, 6 Cal.2d 537, 58 P.2d 1278; *Darnall* v. *Day*, 240 Iowa 665, 37 N.W.2d 277, 280. In the case last cited the court said: 'War, in the practical and realistic sense in which it is commonly used, refers to the period of hostilities and not to a technical state of war which may exist after the fighting has ended.'

" In view of the definitions of 'war' above quoted, the decisions mentioned, and the facts about the Korean war set out in the stipulation of the parties and the facts of general knowledge, we are convinced that the accidental death of the insured on August 23, 1951, occurred 'in time of war'. We mention a few of the facts. It is stipulated that 'combatant activities to which United States Personnel were committed commenced in Korea on or about June 25, 1950, and that said combatant activities have continued without interruption to and including the date of the death of Benjamin Earle Meadows, and that the United States Personnel battle casualties in the Korean area, based on notification to next of kin cumulated for the period through midnight, September 7, 1951' were a total of 82,362. The tabulation in the stipulation shows that of the total casualties up to that time there were 13,822 deaths, 11,495 of them being in the Army and the other more than 2,000 being in the Marine Corps, the Air Force and the Navy.

[[1] See *Annual Digest*, 1946, Case No. 94.] [[2] *Ibid.*, 1948, Case No. 163.]

" We know, as is generally known, that the armed forces of the United States, including all divisions of the service, were engaged in warfare with the North Koreans for more than a year prior to the insured's death in August, 1951, and that after November, 1950, they were engaged in combat also with the Communist Chinese; that many thousands of soldiers of the United States Army fought up and down the Korean peninsula during that period; that the line of battle shifted to the extreme southeast corner of Korea in September, 1950, and then into North Korea, approaching the north boundary on the Yalu River in November, 1950, and then to the south almost back to the 38th parallel in June, 1951; and that during that period powerful units of the United States Navy patrolled and bombarded the coast of North Korea and many hundreds of planes of the United States Air Force gave support to the Army and attacked enemy planes and supply lines.

"A concurring opinion in *Beley* v. *Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A.2d 202, 213, by Justice Musmanno, although he joined in the judgment rendered by the majority of four, contains the following significant statements:

" ' In discussing the principles of law involved in this case, we must assert at once that to deny that the Korean military action is not war in its popularly accepted meaning is to deny the evidence of one's senses. Courts normally take judicial notice of whatever is unquestionably accepted by informed society as fact. A judge does not ask in court for proof that ice forms at the North Pole or that the World Series refers to a contest between baseball teams. Courts know that in Korea, armies are pitted against each other utilizing every device known to modern warfare in the effort and determination to exterminate each other. We know this to be true because every medium of communication extant informs us that it is true. There is not one voice, one printed word, or one picture in the newspapers, radio broadcasts and television images which present themselves before our eyes or appeal to our ears that bespeaks anything to the contrary. In addition, judges have physically seen soldiers who have returned from Korea and have witnessed the evidence of their contact with forces which have inflicted wounds peculiarly the result of gunfire and cannon fire, the trademark of war.'

" We are unwilling in deciding this case to shut our eyes to what everyone knows, that there has been and was when the insured was killed, actually and in reality a war in Korea in which the United States has been seriously engaged. The Court should not ' affect a technical ignorance of the existence ' of that war. The same view is expressed in the opinion of the United States Circuit Court of Appeals in *New York Life Insurance Company* v. *Bennion:*

' When one sovereign nation attacks another with premeditated and deliberate intent to wage war against it, and that nation resists the attacks with all the force at its command, we have war in the grim sense of reality. It is war in the only sense that men know and understand it. Mankind goes no further in his definitive search—he does not stand on ceremony or wait for technical niceties. To say that courts must shut their eyes to realities and wait for formalities, is to cut off the power to reason with concrete facts. We cannot believe that the courts are deprived of the power to deal with this vital question in a practical and realistic sense.' 158 F. 2d 260, 264.

" The decision of the Court of Civil Appeals in this cause is supported by several cases cited and discussed in its opinion. Some of those cases may be distinguished from the instant case. Some hold that no war existed under the facts because there was attack but no resistance at the very time; in others the word ' war ' used in the contract was considered to have been used in a ' technical ' or ' legal ' sense.

" *Beley* v. *Pennsylvania Mutual Life Insurance Company*, 373 Pa. 231, 95 A.2d 202, falls in the class last mentioned. The basis of the opinion holding that the insured, who was killed in battle in Korea on March 7, 1951, was not engaged in military service ' in the time of war ' is that because a policy of life insurance is highly technical the word ' war ' in the policy is intended to be used in its technical or legal sense and means a declared war. It is apparent from the opinion, and especially from the quotation which has been set out above from the concurring opinion by Justice Musmanno, that the decision doubtless would have been different if the Court had given the words used in the policy, as they are given in this state, their ordinary and generally understood meaning. The decision in the Beley case was by a majority of four to two, and in our opinion the dissenting opinions are more convincing and are more strongly supported by authority than are the opinions written for the majority.

"A very recent opinion by a Superior Court of New Jersey, *Stanberry* v. *Aetna Life Insurance Company*, 26 N.J.Super. 498, 98 A.2d 134, 137, holding exactly contrary to the decision of the Pennsylvania court in the Beley case, criticising that decision and declining to follow it, points out that the Pennsylvania court gave a ' legalistic, technical construction ' of the word ' war ', whereas the New Jersey courts have given the word a ' realistic interpretation when used in private contracts or documents.'

" In a recent well supported opinion, another trial court, the United States District Court of the Southern District of California, held that there could be no recovery of double indemnity in an action on a life insurance policy which provided for the payment of double indemnity in the event of death of the insured by accidental means, except in the event of the death of the insured while ' in the military, naval or air forces of any country at war.' The insured, in the military service of the United States, was killed by enemy small arms fire in Korea on August 31, 1951. *Weissman* v. *Metropolitan Insurance Co.*, 112 F.Supp. 420, 421.

" The opinion of the Court of Civil Appeals herein in its approval of the Beley case raises the question presented in that case as supporting its decision, how can it be known when a war begins unless there is a formal declaration of war ? One of the opinions of the Court in the Beley case contains the following: ' Would the appellant insurance company argue that the military action became war when the casualties reached a certain figure, say, 5,000 or 10,000 ? Would it argue that the action certainly was war when the casualties mounted to 50,000 ?' 95 A.2d 216. We are not concerned here with the exact time when the Korean war began. It is enough for us to know that war on a large scale had been waged for a long time in Korea and was still being waged when the insured met accidental death.

" In summary: It is, as has been said, the settled law in this state that, unless a contrary intention is shown by the contract, the terms used in policies of insurance are to be given their plain, ordinary and generally accepted meaning. It is clear that nothing in the contract of insurance involved herein suggests that the word ' war ' is used in its ' technical ' or ' legal ' sense. It is clear that the plain, ordinary and generally accepted meaning of the word ' war ' is war in fact. It is clear that there was war in fact in Korea when the insured was killed and that he was killed ' in time of war.' It follows that there can be no recovery under the accidental death provisions of the policies."

[Reports: 152 Tex. 559, 261 S.W.2d 554; *certiorari* denied, 347 U.S. 928, 98 L.Ed. 1081, 74 Sup.Ct. 531 (1954).]

NOTE.—(1) The above case is noted in *Baylor Law Review*, 6 (1953), p. 111, and *Georgetown Law Journal*, 42 (1954), p. 318.

(2) The same view of the Korean conflict as " war " for the purpose of life insurance contracts was taken in *Weissman* v. *Metropolitan Life Insurance Co.*, 112 F. Supp. 420 (S.D. Calif. 1953) (noted in *Vanderbilt Law Review*, 7 (1954), p. 295, and *Michigan Law Review*, 52 (1954), p. 884); and *Stanberry* v. *Aetna Life Insurance Co.*, 26 N.J. Super. 498, 98 A. 2d 134 (1953).

The contrary view, that the failure of the Congress to declare war denied the Korean conflict the character of " war ", as that term was used in insurance contracts, was taken in *Beley* v. *Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 231, 95 A.2d 202, 36 A.L.R.2d 996 (1953), *certiorari* denied 346 U.S. 820, 98 L.Ed. 346, 74 Sup.Ct. 34 (1953); and *Harding* v. *Pennsylvania Mutual Life Insurance Co.*, 373 Pa. 270, 95 A2.d 221 (1953). (The *Beley* and *Harding* cases are noted in *Albany Law Review*, 17 (1953), p. 196; *Catholic University Law Review*, 3 (1953), p. 60; *Dickinson Law Review*, 57 (1953), p. 172; *George Washington Law Review*, 21 (1953), p. 657; *International and Comparative Law Quarterly*, 2 (1953), p. 316; *Kansas Law Review*, 2 (1953), p. 194; *Miami Law Quarterly*, 7 (1953), p. 261; *New York University Law Review*, 28

(1953), p. 899; *Southern California Law Review*, 26 (1953), p. 328; *Temple Law Quarterly*, 26 (1953), p. 336; *University of Pittsburgh Law Review*, 14 (1952), p. 122; and *West Virginia Law Review*, 55 (1953), p. 149.)

War—Meaning of—Hostilities in Absence of Declaration of War—The Korean Conflict—Whether War for Purpose of United States Military Law.

UNITED STATES *v.* BANCROFT.

United States, Court of Military Appeals. July 3, 1953.

THE FACTS.—The accused had been tried in Korea in 1952 by a special court-martial of the Navy for the offence of sleeping on post in violation of Article 113 of the Uniform Code of Military Justice, 50 U.S.C. § 707, which provides:

> " Any sentinel or look-out who is found drunk or sleeping upon his post, or leaves it before he is regularly relieved, shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, but if the offense is committed at any other time, by such punishment other than death as a court-martial may direct."

Offences for which capital punishment is permissive, but not mandatory, are not, under the Uniform Code of Military Justice, subject to the jurisdiction of special courts-martial unless certain special procedural steps are taken.

A board of review of the Navy held that since the alleged offence took place in Korea during the conflict in that country, it was a capital one, and that the special court-martial therefore had no jurisdiction over the offence. On certificate from the Judge Advocate General, United States Navy, requesting a determination whether the court-martial had jurisdiction to hear the cause,

Held: that the decision of the Board of Review must be affirmed. The Korean conflict was " war " for the purposes of Article 113 of the Uniform Code of Military Justice, and the court-martial which convicted the accused was accordingly without jurisdiction.

The Court said: "Although this Court has never categorically set out its views on the exact nature of the Korean conflict, we have for purposes of disposing of certain isues, where a state of war was conceded by all parties, accepted the concession. See *United States* v. *Horner* (No. 1031), 2 USCMA 478, 9 CMR 108, and *United States* v. *Young* (No. 1015), 2 USCMA 470, 9 CMR 100, both decided May 8, 1953. Concessions have not been made in this case and the issue is in sharp dispute. We must, therefore, dispose of the respective contentions. We believe a finding that this is a time of war, within the meaning of the language of the Code, is compelled by the very nature of the present conflict; the manner in which it is carried on;

the movement to, and the presence of large numbers of American men and women on, the battlefields of Korea; the casualties involved; the sacrifices required; the drafting of recruits to maintain the large number of persons in the military service; the national emergency legislation enacted and being enacted; the executive orders promulgated; and the tremendous sums being expended for the express purpose of keeping our Army, Navy and Air Force in the Korean theatre of operations. For our purpose, it matters not whether the authorization for the military activities in Korea springs from Congressional declarations, United Nations Agreements or orders by the Chief Executive. Within the limited area in which the principles of military justice are operative, we need consider only whether the conditions facing this country are such as to permit us to conclude that we are in a state of war within the meaning of the terms as used by Congress. A reading of the daily newspaper accounts of the conflict in Korea; an appreciation of the size of the forces involved; a recognition of the efforts, both military and civilian, being expended to maintain the military operations in that area; and knowledge of other well-publicized wartime activities convinces us beyond any reasonable doubt that we are in a highly developed state of war. Moreover, we believe that battle conditions, where many lives depend upon the proper performance of hazardous duty by each and every individual, require that peacetime sentences with regard to military offenses be discarded and the more severe wartime sentences be invoked. It would indeed be an insult to the efforts of those servicemen who are daily risking their lives in defense of democratic principles to hold that peacetime conditions prevail. Conceding that other courts in certain civilian cases have held that a formal declaration of war is a condition precedent to a state of war, the reasons which are influential there are not persuasive here. For our purposes we need not get into the refinements of those cases which interpret the terms of a contract nor decide whether we are engaged in a de facto or de jure war. Practical considerations are more important. We cannot, of course, arrive at a decision contrary to the clear intent of Congress, but in view of the historical development of this phase of military law, previous impositions of wartime penalties during conflicts which were not clearly authorized by a Congressional declaration, the wording of the Code, and the interpretation Congress itself has placed on the hostilities by re-establishing certain wartime rights, cause us to believe that when The President, as Commander-in-Chief, ordered members of the armed services into the conflict, he involved this country in hostilities to such an extent that a state of war existed; and that Congress, when it used the phrase ' in time of war ' in the military Code, intended the phrase to apply to that state regardless of whether it was initiated or continued with or without a formal declaration.

" Our conclusion in this regard is not without precedent and is not contrary to any view expressed by the United States Supreme Court in the recent case of *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 US 579, 96 L. ed 1153, 72 S Ct 863. That case did not pass on issues similar to those facing us but other Federal cases have. Before dealing with them we consider it desirable to quote the following statement from Winthrop in his Military Law and Precedents, 2d ed., 1920 Reprint, at page 668:

'But a declaration of war by Congress is not absolutely necessary to the legal existence of a status of foreign war.[20] Such a war cannot indeed be declared or initiated by the President, but, if declared or commenced against us by another power, which, thereupon, before our Congress can or does act, proceeds to invade our territory, or to attack the defences of our coast or frontier, such invasion or attack must, under the orders of the Executive as Commander-in-Chief, be met and resisted by force against force, and in this armed meeting and resistance there is war. Under such circumstances a legal status of foreign war would actually exist, and the jurisdiction created by the present Article would become operative, in the absence of, or rather prior to, any formal declaration or other action on the part of Congress.'

"If we were to rely on this early authority, we could say that the presence of American troops in the Far East, their purpose for being there, our commitments to the United Nations, the conflicting ideologies then existing, and the attack by the North Koreans and Communists were of sufficient importance that, when The President ordered the military services to resist the aggression and the advance of Communism, a legal status of foreign war existed for the purpose of applying the provisions of the Uniform Code of Military Justice, 50 USC §§ 551–736.

"In *Hamilton* v. *M'Claughry*, 136 F 445 (CCD Kan), a determination of the nature of the Boxer Uprising in China, within the meaning of the 58th Article of War, 10 USC § 1530, which allowed trial by court-martial for certain offenses in time of war, was considered. The court in holding a state of war existed stated:

'By act of Congress the pay of the officers and men in the military service of this country during the time they were occupied in China was increased to the amount paid in time of actual war, notwithstanding the fact that during all the time of the military occupation of China by this and other foreign nations the government of China maintained with this and other foreign nations engaged in such occupation a footing of peace, and notwithstanding the further fact that at no time was there any declaration of war on the part of this government against the government of China. Yet I am constrained to hold that by reason of the occupation of Chinese territory by the large military force of this government, under authority of the Department of War, the many conflicts

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'[20] Declarations of war or similar formal notices are held by modern writers on International Law not to be necessary to the initiation of a status belli. See Phillimore, vol. 3, ch V; Hall, 321. And compare the interesting publication on "Hostilities without Declaration of War," by Lt. Col. Maurice, Royal Artillery, London, 1883.'

between the forces of this government and the armed Chinese troops, and the recognition of a condition of war by the Congress of the United States in making payment to the officers and men of this government there engaged on a war basis and all the other facts and circumstances in this case, at the time the homicide in question was committed there prevailed in China a condition of war, within the spirit and intent of the fifty-eighth article of war, for that this government was there asserting its right of protection over the citizens and accredited representatives of this government, and their property, by force of arms; that the essential and requisite jurisdictional facts authorizing a trial of petitioner by a general court-martial, under the provisions of the fifty-eighth article of war, did and must of necessity be held to have existed; and that the judgment of that court must be upheld and enforced, and the writ denied.'

" In the early case of *The Eliza* (*Bas* v. *Tingy*) (1800), 4 US 37, 11 L ed 731, the United States Supreme Court had this to say about declared and undeclared war:

'. . . . every contention by force between two nations, in external matters, under the authority of their respective governments, is not only war, but public war. If it be declared in form, it is called solemn, and is of the perfect kind. . . . [p. 39].

' But hostilities may subsist between two nations, more confined in its nature and extent; being limited as to places, persons, and things; and this is more properly termed imperfect war; because not solemn, and because those who are authorized to commit hostilities act under special authority, and can go no further than to the extent of their commission. Still, however, it is public war, because it is an external contention by force, between some of the members of the two nations, authorized by the legitimate powers. It is a war between the two nations, though all the members are not authorized to commit hostilities such as in a solemn war, where the government restrains the general power.' [p. 40]

In the case of *United States* v. *Gilbert*, 9 BR–JC 183 (1950), the Judicial Council held that the present conflict in Korea was a war within the meaning of Article of War 75, 10 USC § 1547. That case was decided after enactment, but almost a year prior to the effective date, of the Uniform Code of Military Justice, and Congress has not seen fit to narrow the interpretation placed on the phrase ' in time of war.' It may well be that the holding was not called to the attention of Congress, but many individual members of the Senate and the House were well aware of it. The Judicial Council in that case used the following language (page 222):

' Even assuming, as contended by counsel, that a state of war is a pre-requisite to the application of Article of War 75, we still conclude, for the reasons hereinafter set forth, that the Article was in full force and effect at the time and place of the accused's offense, notwithstanding the legislative termination of World War II on 25 July 1947 so far as Article of War 75 is concerned (61 Stat 449, ch. 327, sec. 3). The background, extent and nature of the hostilities between the United States and North Korean forces on 31 July 1950, and the inevitable results of such hostilities up to that time in terms of casualties, again matters of common knowledge and therefore proper subjects of judicial notice, are genuine proof of the existence of a state of public war between the two governments on that date.'

" In a more recent case, namely, *CM* 347025, *Anderson*, 1 CMR 345, a board of review in the office of the Judge Advocate General of the Army reached a similar conclusion. The board there stated:

' The Congress has seen fit in the present conflict to allow additional exclusions from gross income for purposes of computation of income tax by officers and enlisted personnel who serve as members of the armed forces of the United States " in a combat zone after June 24, 1950 and prior to January 1, 1952." (Section 202 (a) Revenue Act of 1950; Pub. Law 814, 81st Cong.; 26 USC 22 (b) (13).) Pursuant to this act the President, in Executive Order No. 10195, Dec. 21, 1950, 15 Fed Reg 9177, designated Korea and the waters adjacent thereto within certain described limits " as an area in which armed forces of the United States have engaged in combat." See also *New York Life Ins. Co.* v. *Bennion*, 158 F2d 260, 264 (CCA 10th, 1946), *cert.* denied 331 US 811[1], and Borchard, When Did the War Begin?, 47 Col L Rev 742–648, and authorities therein cited.

' In view of the above it is believed that a state of war existed in Korea on 29 January 1951 within the meaning of Article of War 58. . . . .'

" Furthermore, in view of the recent case of *United States* v. *Gann and Sommer* (No 1425), 3 USCMA 12, 11 CMR 12, decided this date, we held the status of the present conflict in Korea to be a state of war, we now find no good reason to reject these credible authorities and, therefore, conclude that the offense for which the accused was tried and convicted must be found to be a capital offense."

The Court then proceeded to an examination of the law concerning the jurisdiction of special courts-martial and concluded that the court which tried the accused had no jurisdiction over him.

[Reports: 3 U.S.C.M.A. 3, 11 C.M.R. 3.]

NOTE.—The Court of Military Appeals also held a desertion in Korea during the conflict in that country to be in time of war, in *United States* v. *Gann* and *Sommer*, 3 U.S.C.M.A. 12, 11 C.M.T. 12. In *United States* v. *Wilkerson*, 12 C.M.R. 776, a board of review held the Korean conflict to be a " state of war " so far as persons subject to the Uniform Code of Military Justice in Japan were concerned. The same conflict was considered by another board of review to be a war for the purpose of suspending the statute of limitations for the offense of fraudulent enlistment in the United States (*United States* v. *Taylor*, 11 C.M.R. 428).

United States v. *Bancroft* is noted in *Journal of Public Law*, 2 (1953), p. 459.

[[1] See *Annual Digest*, 1946, Case No. 94.]

War—Definition of—Hostilities between Forces of United Nations and Third States—Whether Armed Forces of Such States Enemies in the Technical Sense—War in Korea—Status of French Soldiers as Members of United Nations Forces—The Law of France.

WAR IN KOREA (SELF-MUTILATION) CASE.

France, Court of Appeal of Paris. December 10, 1953.

THE FACTS.—According to the French Military Penal Code, self-mutilation in the presence of the enemy is an " aggravating circumstance " of the ordinary offence of self-mutilation and as such liable to more severe punishment. One S., who had previously served in the French Army, volunteered for service with the United Nations Forces in Korea, and while serving in the field in that country deliberately shot himself in the arm. On behalf of the prosecution it was contended that S. was guilty of the aggravated offence of self-mutilation in the presence of the enemy, on the ground that the armed forces of North Korea and the Chinese People's Republic facing the United Nations Forces were enemies in the proper sense of that term. On behalf of S. it was contended that there was no state of war between France and the two countries here referred to because (i) there had been no declaration of war, as required by Hague Convention No. III of October 18, 1907, nor a vote by the French National Assembly preceding a declaration of war by France, as required by the French Constitution, and (ii) war could only exist between France and countries recognized by France, and as neither North Korea nor the Chinese People's Republic had been so recognized, there was no war between France and those countries, with the result that the armed forces of the latter were not enemies in the proper sense of that term.

Held: that all the contentions put forward on behalf of S. must be upheld, and that S. was accordingly not guilty of the aggravated offence of self-mutilation in the presence of the enemy.

The Court said: "France was not at war with Korea when the events charged against the accused occurred. The military operations of the French battalion in Korea were not preceded by an express notification of a state of war, as required by Hague Convention No. III of October 18, 1907, nor by a declaration of war passed by a vote of the National Assembly upon the previously expressed view of the Council of the Republic, as provided in Article 7 of the Constitution of October 27, 1946. Furthermore, a state of war can only exist between States which have recognized each other. The hostilities which took place between June 25, 1950, and July 27, 1953, ranged on opposite sides the United Nations and forces of North Korea and the Chinese People's Republic, neither of which countries is recognized by the French Government. Lastly, except in so far as concerns Indo-China, the state of war terminated on June 1, 1946, by virtue of the Law of May 10, 1946, which laid down the legal date of the cessation of hostilities. In these circumstances the forces facing the French battalion of the United Nations cannot be regarded as enemies, and the charge to be preferred against S. is that of ordinary self-mutilation without aggravating circumstances . . ."

[Report: *Dalloz*, 1954, *Jurisprudence*, p. 155.]

War—Meaning and Existence of—United Nations Enforcement Action in Korea.

AUSTRALIAN COMMUNIST PARTY *v.* THE COMMONWEALTH.

Australia, High Court. March 9, 1951.

(Latham C.J., Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ.)

THE FACTS.—The Communist Party Dissolution Act came into force on October 20, 1950.[1] The Act alleged in the Preamble that the Australian Communist Party was linked, *inter alia*, with espionage, sabotage and other treasonable activities. The Act declared the Australian Communist Party to be an unlawful association, dissolved it, and provided for the vesting of its property in a receiver. The Act also contained provisions affecting persons and bodies of persons who were members of, or were in effect dominated by or under the influence of, the Australian Communist Party. The constitutional validity of this Act was attacked by the plaintiffs on various grounds, the principal of which was that the Act was not a law concerning any subject with respect to which the Commonwealth Parliament possessed legislative power. In particular, it was contended that it was not a law which came within the power of the Commonwealth Parliament to legislate with respect to the defence of the Commonwealth. On this point the validity of the Act was supported by the defendants by the contention that, at the date of the passing of the Act, there was considerable international tension, and that, at that date, Commonwealth forces were engaged in fighting in Korea against forces which were communist-supported.

Held (Latham C.J. dissenting): that the Act was invalid. In the state of ostensible peace existing at the time the Act came into force the scope of the defence power did not extend to cover the Act.

The Court said[2] (*per* Latham C.J.): "The plaintiffs on many occassions referred to the old saying which is quoted in Chitty on *The Prerogatives of the Crown* (1820), p. 43—*ubi bellum non est pax*

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[1] During the period of "armed conflict" in Korea.

[2] The judgment bears primarily on considerations of municipal law, and the only passages quoted are those which concern matters relevant to international law.

est. In my opinion the events of recent years requires a reconsideration of this maxim. Actual fighting in the Second World War ended in 1945, but only few peace treaties have been made. The Court may, I think, allow itself to be sufficiently informed of affairs to be aware that any peace which now exists is uneasy and is considered by many informed people to be very precarious, and that many of the nations of the world (whether rightly or wrongly) are highly apprehensive. To say that the present condition of the world is one of ' peace ' may not unfairly be described as an unreal application of what has become an outmoded category. The phrases now used are ' incidents ', ' affairs ', ' police action ', ' cold war '. The Government and Parliament do not regard the present position as one of perfect peace and settled security, and they know more about it than the courts can possibly know as the result of considering legally admissable evidence. I have already referred to the authorities which show that neither the technical existence of war nor actual fighting is a condition of the exercise of the defence power. At the present time the Government of Australia is entitled, in my opinion, under the defence power to make preparations against the risk of war and to prepare the community for war by suppressing, in accordance with a law made by Parliament, bodies believed by Parliament to exist for the purpose (*inter alia*) of prejudicing the defence of the community and imperilling its safety. It is immaterial whether the courts agree with Parliament or not."

(*Per* Dixon J.) " What the defence power will enable the Parliament to do at any given time depends upon what the exigencies of the time may be considered to call for or warrant. The meaning of the power is of course fixed but as, according to that meaning, the fulfilment of the object of the power must depend on the everchanging course of events, the practical application of the power will vary accordingly. Hitherto a marked distinction has been observed between the use of the power in war and in peace. ' But this Court has hever subscribed to the view that the continued existence of a formal state of war is enough in itself, after the enemy has surrendered, to bring or retain within the legislative power over defence the same wide field of civil regulation and control as fell within it while the country was engaged in a conflict with powerful enemies (*R.* v. *Foster*[1]).' Correspondingly it is no doubt true that a mounting danger of hostilities before any actual outbreak of war will suffice to extend the actual operation of the defence power as circumstances may appear to demand. Throughout this case I have been impressed with the view that the validity of the Act must depend upon the possibility of bringing into application as at the date of the assent to the Act the conceptions as to the operation of the defence power which hitherto have been generally regarded as appropriate only to a time of serious armed conflict. Unless this were possible I have failed to see a way of reconciling it with constitutional principle.

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[1] 79 C.L.R., at pp. 83, 84.

"At the date of the royal assent Australian forces were involved in the hostilities in Korea, but the country was not of course upon a war footing, and, though the hostilities were treated as involving the country in a contribution of force, the situation bore little relation to one in which the application of the defence power expands because the Executive Government has become responsible for the conduct of a war. I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed."

(*Per* McTiernan J.) " It is, of course, for Parliament to measure the emergency confronting the Commonwealth and to take the legislative measures which are required to meet it . . . Parliament, however, has not declared in the Communist Party Dissolution Act that it was passed for the prosecution of any war present or future, or that there is any immediate or present danger of war. At the time the Act came into force the Commonwealth was not engaged in any hostilities except in Korea. The state of affairs was peace not war. Indeed the constitutional position was that the defence power had declined from the zenith to which it had risen in the crisis of the last war practically to the level proper to it in time of peace."

[Report: 83 C.L.R. 1.]

War—Meaning and Existence of—State of Hostilities and State of International Tension—Applicability of National Defence Preparation Legislation.

MARCUS CLARK & CO. LTD. *v.* THE COMMONWEALTH.

Australia, High Court. September 12, 1952.

(Dixon C.J., McTiernan, Williams, Webb, Fullagar and Kitto JJ.)

THE FACTS.—The Defence Preparations Act, 1951, came into force on July 19, 1951.[1] The Preamble to the Act recited that in the opinion of the Parliament and of the Government of the Commonwealth there existed at that time a state of international emergency in which it was essential that preparation for defence should be immediately made to an extent not previously necessary except in time of war. The Act then went on to empower the Governor-General of Australia to make regulations " for or in relation to defence preparations ". Under this Act Capital Issues Regulations were made which prohibited a variety of financial transactions except with the consent of the Treasurer of the Commonwealth, which consent may be granted unconditionally or conditionally, or it may be refused: consent, however, may not be refused or granted conditionally " except for purposes of or in relation to defence preparations ". The Treasurer's consent was refused to a capital issue which the plaintiffs proposed to make. On demurrer the plaintiffs raised three principal matters of law: (1) whether the Act was a valid exercise of the constitutional powers of the Commonwealth Parliament; (2) if it was, whether it authorized the making of the Capital Issues Regulations; (3) if the Regulations were valid, whether the refusals of the Treasurer were justified by the Regulations. The defendants relied principally on the power of the Commonwealth Parliament to legislate with respect to the defence of the Commonwealth, which power it was claimed had been properly exercised in the existing state of international tension.

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[1] During the period of " armed conflict " in Korea.

Held (Williams and Kitto JJ. dissenting): that the demurrer must be overruled. The Act and the Regulations were within the power of the Commonwealth Parliament to legislate with respect to the defence of the Commonwealth.

The Court said[4] (*per* Dixon C.J.): " In considering the application or operation of the defence power the distinction between a period of actual hostilities and a period of apprehended danger short of war can never be disregarded. In relation to practical measures of some descriptions it may prove decisive. Many restrictions upon civilian life may spring from the existence of an actual state of war or of actual hostilites, as for instance restrictions upon trading with the enemy, the use of radio transmitters or the display of lights. But the restrictions upon raising money by the issue of share capital or debentures or other securities are auxiliary to and consequential upon the diversion of tangible and intangible resources to warlike purposes, and such a diversion a country may feel constrained to make under a threat of war as much as when actually engaged in hostilities . . . The preamble to the Act recites the danger which occasions the need to make preparations against the possibility of war. The second recital states that in the opinion of the Parliament and of the Government, there exists a state of international emergency in which it is essential that preparations for defence should be immediately made to an extent and with a degree of urgency not hitherto necessary except in time of war. . . . What we have to decide is whether the situation was one to which such an exercise of the legislative power with respect to defence as the regulations contain could be legitimately addressed because the restriction imposed by the regulations might reasonably be considered conducive to the main purpose, namely direct preparation for the defence of the Commonwealth at a time when fears of war exist, and be considered to tend to promote that purpose in a manner that is not tenuous or speculative or remote." The Chief Justice then went on to find that the connexion between the defence power and the control of capital issues when necessary to counter the inflationary effects produced by war is definite and real.

(*Per* Williams J.): " In my opinion the factors that could give the defence power sufficient reach and operation to support the Capital Issues Regulations were wanting in August 1951. All that was then certain was that there was severe international tension and danger of a third world war and that the threat of war was so grave that preparations on a large scale to defend the Commonwealth were urgent. That was a state of tension that might last for years and might require continued preparation for war on a similar scale for an indefinite period . . . It could not be said in August 1951 that there was ' an immediate apprehension of war '. The danger of war was no greater than the danger which existed in October 1950 when the Communist Party Dissolution Act 1950 came into force. In the *Communist Case* [(1951) 83 C.L.R., at p. 196] the present Chief Justice said:

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[4] The judgment bears primarily on considerations of municipal law, and the only passages quoted are those which concern matters relevant to international law.

' I think that the matter must be considered substantially upon the same basis as if a state of peace ostensibly existed.'

McTiernan J. said:

' The state of affairs was peace not war. Indeed the constitutional position was that the defence power had declined from the zenith to which it had risen in the crisis of the last war practically to the level proper to it in time of peace. The Court has frequently declared, since the end of hostilities in the last war, that the defence power stands in that position.' [(1951) 83 C.L.R., at p. 207].

In my opinion the Court should be slow, at any time prior to the stage at which it is necessary to place the nation upon a war footing, to hold that the defence power is wide enough to authorise Commonwealth legislation on economic subjects normally exclusively within State legislative power . . . The Capital Issues Regulations are a form of legislation which, consistently with the attitude which this Court has adopted to the exercise of the defence power in the past, can only be supported by that power when the nation is placed upon a war footing under the immediate apprehension of hostilities and during hostilities and their aftermath."

[Report: 87 C.L.R. 177.]

War—Meaning and Existence of—United Nations Enforcement Action in Korea—Suppression of Armed Insurgency in Malaya.

BURNS *v.* THE KING.

Australia, New South Wales Quarter Sessions Appeal Court.
(Berne and Lloyd JJ.)[1]
April 6, 1951.

THE FACTS.—An Australian Communist newspaper, *The Tribune*, published various articles dealing with the hostilities then taking place in Korea. Burns, the publisher of *The Tribune*, was tried on a charge of sedition. The prosecution alleged that articles printed in *The Tribune* dealing with the Korean hostilities were intended to promote feelings of ill-will and hostility between different classes of His Majesty's subjects so as to endanger the peace, order and good government of the Commonwealth, and to promote disaffection against the Government and Parliament. In August 1950, a Summary Court convicted him on this charge. Burns appealed against this conviction on the ground, *inter alia*, that the war in Korea was illegal because the decision of the Security Council was invalid since the U.S.S.R. was not represented when it was made. Judge Berne, before whom the appeal was heard, was seriously concerned with the nature of the hostilities in Korea, and also those in Malaya, and he was of the opinion that the articles complained of could not possibly be seditious if the Korean hostilities constituted an illegal war. In order to prove the legality of the Korean war and of the participation of Australian troops therein, prosecuting counsel referred to Australia's obligations under the Charter of the United Nations. This argument did not appeal to Judge Berne, who took a narrow view of the wording of the Australian Charter of the United Nations Act. This statute was described as " An Act to approve the Charter of the United Nations ", and the learned Judge stated: " The view I take is that the United Nations Charter is only an agreement . . . The Crown did not ratify it. It said it approved of the agreement. It would have been very easy for the Crown to have said that the Charter was approved and ratified . . . The agreement did not supersede the Constitution and any assistance given in Korea must be justified by law." The learned Judge seemed equally doubtful as to the nature of the operations in Malaya. These he described as " merely police action against terrorists. It is quite legal to use troops to break strikes and load ships. But I do not think it would be legal to quell risings in other countries."

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[1] Although the appeal was heard before Berne J., the case was subsequently removed from his list owing to a conflict of opinion arising between the learned Judge and prosecuting counsel. The judgment was subsequently handed down by Lloyd J.

A series of questions relating to the nature of the hostilities in Korea and Malaya were accordingly submitted to the Australian Foreign Office. The questions, and the answers, were as follows:

" Q. Is Australia at war with North Korea ?

" A. The Government has sent land, sea and air forces to Korea to assist in taking military measures in order to restore international peace and security in Korea as provided in Chapter 7 of the Charter of the United Nations. The Australian forces are engaged in active hostilities and have suffered intensive casualties. That Australia is at war de facto is clear. Whether or not Australia is at war de jure depends on the interpretation of the Charter as applied in the circumstances.

" Q. Is North Korea at war with Australia ?

" A. Answer as above.

" Q. What is the nature of the warlike operations at present north of the 38th Parallel ?

" A. The military operations have proceeded against the 38th Parallel against the resistance of North Korean forces, and are now being carried on in the vicinity of the border between Korea and Manchuria. A feature of these operations is at present under consideration by the Security Council. The Australian Government regards all the Korean operations as having been conducted under the Security Council and in pursuance of the United Nations Charter.

" Q. Is Australia at war with Malaya?
" A. No.
" Q. In both cases, has war been declared?
" A. No declaration has been made in either case.
" Q. What is the nature of the operations being carried on in Malaya?
" A. The Australian Government has sent air forces to assist His Majesty's Government in the defence of Malaya in suppressing armed insurgents conducting guerrilla warfare in that country to the prejudice of the peace and safety of His Majesty's subjects and territories.
" Q. On what authority does the Commonwealth rely for sending troops to either of these places or the expending of public money for equipping those troops?
" A. The Commonwealth Parliament, having by the Charter of the United Nations Act, 1945, approved the Charter, the Government deposited on November 1, 1945, an instrument of ratification, and the Charter thereupon became binding upon the Commonwealth in international law. The Commonwealth has acted in pursuance of the Charter and of the Defence Act, the Naval Defence Act, and the Air Force Act, and under the provision of appropriations made by Parliament.
" Q. What nations were present as required under Article 27 when the resolution was carried that North Korea was the aggressor?
" A. All members of the Security Council except the U.S.S.R.
" Q. Has the Commonwealth ever recognised North Korea?
" A. The Commonwealth has not recognised 'The People's Democratic Republic of Korea'."

On hearing these answers, Judge Berne said that it was " obvious . . . that Australia is at war with Korea, whether it is a *de facto* war or some other kind of conflict."

Held: that the appeal must be dismissed.

[Report: *Sydney Morning Herald*, November 14–15, 1950, and April 7, 1951; *I.L.Q.*, 4 (1951) p. 462.]

NOTE.—It does not appear that any more detailed report of the decision in this case is available. However, it has been decided to include the present report having regard to the peculiarity of the facts and the nature of the questions submitted to the Australian Foreign Office and the answers given to these questions.

War—Hostilities—Meaning of—Right of Enemy Corporation to Sue after Cessation of Hostilities.

See p. 622 (*Schering A.G.* v. *Pharmedica Property Ltd.*).

War—Existence of—Question of Fact—Method of Proof.

See p. 153 (*Silberwacht* v. *Attorney-General*).

II.—Commencement of War

War—Declaration of—Hague Convention No. III of 1907—Whether State of War Exists without Declaration—War in Korea—Status of United Nations Forces—The Law of France.

See p. 591 (*War in Korea* (*Self-Mutilation . . .*) *Case*).

V.—Effects of Outbreak of War

ii.—On Treaties

War—Effects of Outbreak of—On Treaties—Provisions of Subsequent Peace Treaty—Whether Aliens Entitled to Treatment Provided for in Pre-War Treaty—The Law of France.

GAMBINO *v.* CONSORTS ARCENS.

France, Cour de Cassation. March 11, 1953.

THE FACTS.—A Treaty of June 3, 1930, between France and Italy provided that Italian nationals settled on French territory were entitled, in so far as tenure of agricultural land was concerned, to the same treatment as French nationals. Article 44 of the Peace Treaty with Italy of February 16, 1947, provided that each of the Allied and Associated Powers, of whom France was one, should notify Italy, within a period of six months, of the bilateral treaties concluded with Italy before the war which it desired to maintain or re-apply. The above-mentioned Treaty was not one of those bilateral treaties with Italy the maintenance or re-application of which France had notified to that country. Laws enacted in France in 1945 and 1946, respectively, excluded from the benefits of certain farming regulations all foreign nationals. By an exchange of letters between the French and Italian Governments which took place after the enactment of the French laws here referred to, certain matters concerning the settlement of Italian nationals on a most-favoured-nation basis were provided for. No specific reference, however, was made to the tenure of agricultural land. The plaintiff, an Italian national, claimed that he was entitled, so far as concerned his agricultural holding, to be treated on the same footing as a French national by virtue of the Franco-Italian Treaty of June 3, 1930, or at least on a most-favoured-nation basis by virtue of the exchange of letters between the two Governments.

Held: that the action must be dismissed. The continued application of the Treaty of June 3, 1930, would be incompatible with the state of war which had existed between France and Italy. In any event, it was not one of the Treaties in respect of which France had notified Italy that she wished to re-apply it. The exchange of letters between the two Governments was not specifically concerned with the tenure of agricultural land; and the plaintiff, therefore, was not entitled to national or most-favoured-nation treatment.

The Court said: " In so far as concerns the contention that there has been an infringement of Article 61 of the Law of October 17, 1945 (as amended by the Law of April 13, 1946), of the Franco-Italian Treaty of June 3, 1930, and of the exchange of letters, the appeal claims that the decision of the Court below refused to grant to farmer Gambino, by reason of his Italian nationality, a two-thirds' share in the produce of the land, notwithstanding that the above-mentioned instruments grant to Italians, in the matter of tenure of agricultural land, national treatment or at least treatment on a most-favoured-nation basis. Italy's declaration of war on France was incompatible with the obligations imposed upon the latter country by the Treaty of June 3, 1930, concerning the settlement of Italian nationals on French territory. The armistice which suspended hostilities left the state of war in existence, and the Treaty of 1930 is not included in the list of treaties which have again entered into force by virtue of Article 44 of the Peace Treaty of February 16, 1947 . . . Lastly, the exchange of letters of May 17, 1946, ratified by a Decree dated August 25, 1947, and published on August 27, 1947, concerning the settlement of Italian nationals, though later in date than the Law of April 13, 1946, does not contain any reference to the latter or to the right established by virtue of the legislation on landlord and tenant. It cannot, therefore, be interpreted as setting aside the application of the above-mentioned Article 61, which denies to foreign nationals the benefit of the farming regulations."

[Reports: *Clunet*, 80 (1953), p. 636; *Sirey*, 1953, *Jurisprudence*, Part I, p. 193; *Dalloz*, 1953, *Jurisprudence*, p. 300.]

iv.—On Enemy Subjects with regard to

(b) THEIR PROPERTY AND OTHER RIGHTS.

War—Effects of—On Property—Enemy Character of Trade Marks —Relevance of Ownership of Controlling Enterprise.

STATE OF THE NETHERLANDS AND NEDERLANDS BEHEERS-INSTITUUT *v.* RIKKERS BROS.

Holland, District Court of Amsterdam. December 12, 1951.
Court of Appeal, Amsterdam. December 18, 1952.
Supreme Court. June 26, 1953.

THE FACTS.—Among the property transferred to the State by the Royal Decree on Enemy Property, of October 20, 1944 (*Staatsblad*, No. E 133) were, so far as their future use in the Netherlands was concerned, trade marks which had been registered within the Netherlands with the Bureau for Industrial Property and to which German individuals and companies were entitled. In 1950/1951, the defendants, a Netherlands firm, used certain trade marks for fountain pens, etc., in Holland, with the consent of the owners of factories in Germany, where the articles in question were made. On behalf of the State, the Nederlands Beheers-Instituut[1] claimed from the defendants a royalty for this use, on the ground that the State had, by virtue of Decree No. E 133, become the proprietor of the trade marks. The defendants refused to recognize that ownership, and declined the offer of the State to allow them to continue using the trade marks on payment of a royalty. Thereupon the plaintiffs sued the firm in respect of the latter's illegal use of the trade marks in Holland and asked for an injunction of the Court against further use thereof.

Held (by the District Court): that the action must be dismissed and an injunction refused.

The Court said: "Under sec. 20 of the Netherlands Trade Marks Act a trade mark can only be transferred along with the factory or commercial business concerned [with the making of the article bearing the mark]. Since the German factories themselves have not passed to the Netherlands State, the right to use their trade marks cannot have passed to it either. All that the State acquired under the Decree on Enemy Property was the right to stop anyone who was unlawfully using a trade mark in Holland, from doing so. In the present case, however, the defendants had been using the trade marks in question with the consent of the original German owner. Their action was, therefore, not illegal."

On appeal,

Held (by the Court of Appeal): that the judgment of the Court below must be reversed and the claim of the State and the Nederlands Beheers-Instituut allowed. The Court rejected the contention of the defendants that the separate transfer of a trade mark without a simultaneous transfer of the enterprise entitled to its use is legally impossible, and that a bare right to make use of a trade mark cannot exist. According to modern Dutch economic and legal conceptions, the exclusive use of a trade mark can very well form the object of an independent right, divorced from the ownership of the industrial or commercial enterprise which was concerned with it. This was recognized in the Netherlands Law of June 7, 1950 (*Staatsblad*, No. K 217), which in express terms contemplates such a possibility, and it followed also from the accession of the Netherlands to the Inter-Allied Accounting Rules for German Enemy Property within the jurisdiction of the contracting parties, agreed upon in November 1947, which (in Part III (6)) starts from the premise of the separate existence of rights to German trade marks." [Report: *N.J.*, 1952, No. 323.]

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[1] Office for the Administration of Enemy Property.

On further appeal,

Held (by the Supreme Court): that the appeal must fail.

The Court said: "Articles 2 and 6 of the Paris Convention for the Protection of Industrial Property, 1883, so far as they were intended to guarantee to subjects of the Contracting States protection equal to that which their own nationals might derive from their municipal legislation, did not in any way preclude such States, in case of war, from enacting legislation of a general character affecting enemy trade marks in accordance with accepted principles of international law."

[Report: *N.J.*, 1953, No. 615.]

War—Effects of—On Private Enemy Property—Subject to Possible Expropriation—Right of Enemy Corporation to Sue to Protect Such Property.

See p. 622 (*Schering A.G.* v. *Pharmedica Property Ltd.*).

vii.—Trading with the Enemy

Trading with the Enemy—Enemy Property—Confiscation of—Whether Custodian of Enemy Property has Power of Sale—Whether Sale Consistent with " preserving Enemy Property "—Trading with the Enemy Act, 1939—Distribution of Enemy Property Act, 1949—Trade Marks—Assignment by Custodian.

REUTER CO. LTD. *v.* MULHENS.

England, Court of Appeal. October 16, 1953.

(Evershed M.R., Birkett and Romer JJ.)

THE FACTS.—The plaintiff Company was an English Company which, before the outbreak of war in 1939, had imported and marketed in the United Kingdom " No. 4711 " eau de cologne, which had for generations been manufactured by a secret process by the German firm of Mulhens established in Cologne. Mulhens had registered in the United Kingdom a number of trade marks, including the well-known scroll and bell device and the mark "4711".

The plaintiff Company being then controlled by the firm of Mulhens, the Board of Trade in 1940 made an order under the Trading with the Enemy Act, 1939, giving the Custodian of Enemy Property power to transfer or sell the shares in Reuters. By a further order in 1941, the trade marks hitherto registered in Mulhens's name, and their goodwill in the United Kingdom, were also vested in the Custodian, but this order said nothing about a power of sale.

Throughout the war years Reuters continued to manufacture and market eau de cologne under the "4711" marks, at first using stocks of the original essences but, when these were exhausted, making it without the original essences.

A Board of Trade Order of 1951, made under the Act of 1939, purported to authorize the Custodian to assign the 4711 marks in connexion with or without the goodwill of the Mulhens business in the United Kingdom. In exercise of this power, the Custodian sold for £300,000 the shares in Reuters to another English Company and then, by deed to which the Board of Trade was a party, assigned the 4711 marks to the plaintiff Company, which was then registered as the owner of the marks.

After the state of war with Germany ended on July 9, 1951, the defendant proprietor of the firm of Mulhens, having ceased to have enemy status, wrote certain letters to persons in the United Kingdom, saying that the German product was the genuine 4711 eau de cologne. The letters were enclosed in envelopes bearing the 4711 device.

The plaintiff Company now sought an injunction to prevent infringement of their trade marks, and sued for trade libel or slander. The defendant challenged the right of the plaintiffs to be registered owners of the marks on the ground that the assignment of the marks was in excess of the powers conferred in the Trading with the Enemy Act, and counterclaimed for rectification of the register.

Danckwerts J. gave judgment for the plaintiffs on their claim for infringement of the trade marks, but dismissed their claim for trade libel or slander. Both sides appealed.

Held: that both appeal and cross-appeal must be dismissed. The opening words of s. 7 of the Trading with the Enemy Act, 1939, provided: "With a view to preventing the payment of money to enemies and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace" the Board should have the powers conferred upon it in the Act. The words, however, did not restrict the powers of the Board of Trade to preserving enemy property and the Board had power to make the order authorizing the Custodian to assign the marks, so that the assignment was not *ultra vires* the Custodian.

In any event, by the Distribution of Enemy Property Act, 1949, and the Distribution of Enemy Property (No. 1) Order, 1950, it became the duty of the Board of Trade to realize the trade marks to the best advantage.

Evershed M.R. dealt at some length with the question of trade libel or slander, and also with the defendant's arguments based on the provisions of the Trade Marks Act, 1938; none of these questions raised points of international law.

On the argument based upon the interpretation of the Trading with the Enemy Act, 1939, he said: " The argument of the defendant has been concentrated upon the opening words of section 7 (1). It is said that the only orders or other activities which the section contemplates and empowers the Board to make or direct are orders and other activities which can fairly be required, or justified, on the face of them, for achieving the object of preventing the payment of moneys to enemies, and (whether the word is used conjunctively or disjunctively) of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace.

" So far as the latter words are concerned, Mr. Mould observes that it has never been the policy of English law to confiscate the property of enemies (for which proposition there is, indeed, well-established authority), and he contends, accordingly, that, with the orders vesting in the custodian the marks and any other property capable of being thereby vested, the powers of the Board of Trade under section 7 were exhausted quoad the marks and any such other property. Mr. Mould conceded that, in the case of consumable goods, and perhaps some other kinds of property, a power of sale and a sale would be justified, and, therefore, implicitly conferred, on the ground that, having regard to the nature of the property, nothing or nothing of value, could otherwise be ' preserved ' in contemplation of peace arrangements; but these considerations could, according to his argument, have no place in the case of the trade marks here in question, or, indeed, in the case of the shares in the plaintiff company.

" I have no doubt that, unless the opening words of subsection (1) have the limiting or restrictive effect for which Mr. Mould contends, the opening words of paragraph (d) of the sub-section, the final three lines of the subsection and the terms of section 15 (5) are together amply sufficient, upon their ordinary construction, to justify the conferment of a power of sale or transfer and its subsequent exercise. The question, then, resolves itself into that of construing the opening words of subsection (1).

" Upon this matter we had the advantage, in addition to hearing Mr. Tookey, of hearing also the argument of Mr. Ashworth (who had been instructed by the Board of Trade) as amicus curiae. It was submitted to us that the formula here used ' with a view to preventing ' etc.—is quite distinct from the formulae used in other Acts—for example, the Town and Country Planning Act, 1947, and the Supplies and Services (Transitional Provisions) Act, 1945, where the powers conferred on the Minister or Government Department are powers to make orders or do other acts for a particular purpose, for example, in the case of section 43 of the former Act, to acquire land ' for any purpose connected with the performance of their functions under the following provisions of this Act ' etc. (see *Earl Fitzwilliam's Wentworth Estates Co.* v. *Minister of Housing and*

Local Government, [1952] A.C. 362), and, in the case of the latter Act, to make orders ‘ for the purpose of so maintaining, controlling and regulating supplies and services as (a) to secure a sufficiency of those essential to the well-being of the community . . .’ etc. (see *Blackpool Corporation* v. *Locker*, [1948] 1 K.B. 349).

“ In the present case, the formula used is not, according to the argument, upon its fair interpretation an expression of the purposes to the achievement of which the orders to be made by the Board of Trade must be directed, but is rather an expression of the Parliamentary purpose in conferring upon the Board of Trade the order-making powers later specified. In support of this argument it was pointed out that, in the trading with the enemy legislation passed on the occasion of the first world war, the corresponding Parliamentary intention was expressed by way of a preamble to the Act. The preamble to the Trading with the Enemy (Amendment) Act, 1914, is thus framed: ‘ Whereas it is expedient to make further provision for preventing the payment of money to . . . “ enemies,” . . . and for preserving with a view to arrangements to be made at the conclusion of peace, such money and certain other property belonging to enemies; . . .’ This earlier legislation remained on the statute book until it was repealed by the Act of 1939 now in question; and it was forcibly argued to be highly unlikely that Parliament, in enacting new trading with the enemy legislation on the occasion of the outbreak of the second world war, could have intended by what is in effect a transposition of the preamble in the old Act, still subsisting until the repeal, to cut down substantially the powers conferred.

“ I was, for myself, somewhat troubled by what appears as a cross-heading immediately before section 7 in the print of the Act, bound up with the orders made thereunder, with which we were supplied, namely, ‘ Property of Enemies and Enemy Subjects. Collection of enemy debts and custody of enemy property.’ But a reference to the King’s Printer’s copy of the Act in the Law Reports shows that the second part of the cross-heading is not in fact any part of the Act. In the circumstances I think that the argument put forward by Mr. Tookey and Mr. Ashworth is well founded and that the opening words of the subsection ought not to be treated as having the restrictive effect for which Mr. Mould contends.

“ But if I am wrong upon that matter, there is, in my judgment, a second answer to the defendant’s attack upon the vires of the power of sale and transfer and its exercise, namely, the effect of the Distribution of German Enemy Property Act, 1949, and the Distribution of German Enemy Property (No. 1) Order, 1950, made thereunder (S.I. 1950, No. 1642). This Act (passed, we were told, in implementation of the Potsdam Agreement and other later Allied conferences), is described in its preamble as ‘ an Act to provide for the collection and realization of German enemy property and for the distribution of the proceeds thereof,' and provided by section 1 (1):

' His Majesty may by Order in Council make provision for the collection and realization of German enemy property and for the distribution of the proceeds thereof, to such extent as may be prescribed by the order, to persons who establish claims in respect of German enemy debts.'

It is not in doubt that the words ' German enemy property ' were apt, by virtue of the interpretation section, to comprehend the marks and other property here in question. I need not refer at length to the terms of the order of 1950, No. 1642. Paragraph 18 (1) and (3) of that order were as follows:

' (1) Except in accordance with the foregoing provisions of this part of this order, or with the consent of the administrator, no person other than a custodian shall transfer, dispose of or otherwise deal with any German enemy property; and any transfer, disposal or dealing in contravention of this paragraph shall be void.

' (3) Nothing in this article shall prohibit or restrict the transfer or disposal of or dealing with any property or the payment of any money—(a) by or to a custodian, or (b) in accordance with any direction, or with the consent, of the Board of Trade.'

" In my judgment the passing of the Act of 1949 materially altered the nature of any arrangements that could reasonably be contemplated as likely, or, indeed, possible, to be made at the conclusion of peace. Thenceforward it was, as it seems to me, plain that any such arrangements would not comprehend the return to German nationals of property formerly belonging to them, such as the trade marks here in question (at least if capable by their nature of being sold or disposed of); and that thenceforth it was the duty of the Board of Trade, in contemplation of arrangements which would ultimately be made for applying the proceeds of German enemy property in the manner indicated in the Act of 1949, to realize the trade marks to the best advantage as occasion offered. In these circumstances, even if prior to the passing of the Act of 1949 the terms of the opening lines of section 7 (1) of the 1939 Act would not have justified the making of vesting order No. 238B and the assignment of June 15, 1951, thereunder, after the passing of the Act of 1949, both the order and the assignment became intra vires the Board of Trade to make and execute or direct to be executed. In my judgment this conclusion can clearly in no way be affected by anything stated by the Board of Trade in the Trade Marks Journal for February 4, 1953, which related exclusively to trade marks vested in the custodian by virtue of the later Trading with the Enemy (Custodian) (No. 2) Order, 1951 (S.I. 1951, No. 779)."

Birkett L.J. in the course of his judgment said: " But there is one further matter upon which I think it is perhaps desirable that I should say a very few words. Mr. Mould, in the course of his arguments on behalf of the defendant, made certain submissions upon the true construction of the Trading with the Enemy Act, 1939. He made those submissions with great force, and at times with great fervour, and he clearly regarded them as being of great importance in the presentation of his case. The opening words of section 7 of the Act of 1939 were the words on which Mr. Mould relied, and the material words of the whole section have already been set out in full in the judgment of the Master of the Rolls. Perhaps I may repeat the most material words in the first subsection to section 7:

> 'With a view to preventing the payment of money to enemies, and of preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, the Board of Trade may appoint custodians of enemy property . . . and may by order . . .'

Then follow the detailed matters with which the orders may deal, which have already been read. The first order, with which we are concerned, was made on June 26, 1940, and it related to the 35,186 shares in the plaintiff company then registered in the name of a subsidiary company of the defendant. The second order, with which we are concerned, was made on January 31, 1941, and related to the trade marks. The third order, and perhaps the most vital one of all, was made on April 17, 1951, and it gave power to the custodian, in whom the trade marks had been vested by virtue of the order of January, 1941, to assign and transmit the trade marks either in connexion with the goodwill of the business or not. In June of 1951 the two assignments, which have already been described, were executed, the first dealing with the sale of the shares, and the second dealing with the transfer of the trade marks.

" The submission of Mr. Mould was that the powers of the Board of Trade to make orders was limited by the opening words of section 7. The Board of Trade were confined to the purposes of preventing the payment of money to enemies, or preserving enemy property in contemplation of arrangements to be made at the conclusion of peace, because, on the true construction of section 7, no other order-making powers were given to the Board of Trade. It is fairly plain, I think, that if the whole of section 7 is read and considered in conjunction with section 15 (5) of the Act larger powers are in fact given to the Board of Trade. For example, the Board may by order confer and impose on the custodian such rights, powers, duties and liabilities as may be prescribed as respects property which has been vested in the custodian. But Mr. Mould submits that, despite such wording, everything is governed by the opening words of the section. He says that what has been done in this case by the Board of Trade amounts to confiscation of the property of an enemy, and that confiscation of the property of enemy subjects is not the law of this country. It is true that in the House of Lords both Lord Finlay L.C. and Lord Haldane asserted that the law of this country does not in general confiscate the property of an enemy. In *Daimler Co. Ld.* v. *Continental Tyre and Rubber Co.* (*Great Britain*) *Ltd.* [1916] 2 A.C. 307, 347, Lord Parker said:

> ' Subject to any legislation to the contrary, or anything to the contrary contained in the treaty of peace when peace comes, enemy property in this country will be restored to its owners after the war just as property in enemy countries belonging to His Majesty's subjects will or ought to be restored to them after the war.'

" It is to be observed that the Trading with the Enemy (Amendment) Act, 1914, contained a preamble substantially in the same form as the opening words of section 7 of the Act of 1939; and in *In re Munster* (*Enemy*) [1920] 1 Ch. 268, 278, Russell J. said:

> ' In my judgment the Act of 1914 does not depart from these principles or involve confiscation. Under its provisions the enemy is deprived of beneficial ownership during the war, and the custodian after the termination of the war is bound to deal with it in such manner as His Majesty (keeping no doubt in view the arrangements made at the conclusion of peace) may by Order in Council direct.'

He had said earlier:

> ' The phraseology used in the preamble and in section 5 establishes in my judgment that, pending its disposition by Order in Council after the determination of the war, the property is removed from the control and from the beneficial ownership of the enemy. At the termination of the war fresh considerations will arise; and whether the enemy will recover, and to what extent he will recover the beneficial ownership will depend upon the arrangements made at the conclusion of peace (referred to in the preamble) and upon the terms of any Order in Council, made, I doubt not, with those arrangements in view, under section 5.'

" The Master of the Rolls has already pointed out the difference between the words used in the first subsection to section 7 of the Act of 1939 and the words used in other enactments conferring powers to make orders for specific purposes; and, when the preamble to the Act of 1914 is also kept in mind, the argument addressed to us by Mr. Tookey and Mr. Ashworth receives strong support. They submitted that it was quite wrong to construe the opening words of section 7 in the manner contended for by Mr. Mould, and that the true construction was that the words were intended not to limit the Board of Trade to making orders only for the purposes set out in the opening words, but were rather expressive of the purpose Parliament had in mind when giving to the Board of Trade the powers to make orders relating to the many matters specified in some detail. In my opinion the construction contended for by Mr. Tookey and Mr. Ashworth is a reasonable one, and I think the right one, and I think that the argument of Mr. Mould fails.

" I need add nothing to what the Master of the Rolls has already said about the effect of the Distribution of German Property Act, 1949, and the statutory instrument made thereunder. As from the date of the passing of that Act, it was plain that no arrangements on the conclusion of peace would include the return of this property to German nationals, and the Board of Trade had a clear duty to act in accordance with the statute, and to deal with the trade marks in question in the way which brought the greatest advantage. When the transfer of the trade marks was made in June, 1951, it was made in the light of the provisions of the Act of 1949, and the statutory instrument; and the 'arrangements to be made at the conclusion of peace,' referred to in section 7 of the Act of 1939, could never be such arrangements as would contemplate the handing back of this enemy property to German nationals.

"Neither need I add anything to what has already been said about the argument Mr. Mould addressed to us, that, even if there were power to sell or transfer the trade marks for good consideration, there was no power to part with them for nothing. My Lord has dealt with the facts of that situation and I need not repeat them. I merely repeat that I agree with the judgment of my Lord in dismissing this appeal."

The judgment of Romer L.J. was almost entirely concerned with the points arising out of the Trade Marks Act, 1938. On the Trading with the Enemy Act he was content to say: "On the question whether the opening words of section 7 of the Trading with the Enemy Act, 1939, have any, and if so what, operational effect, I should prefer myself to express no concluded opinion. I entirely agree, however, with the Master of the Rolls that the argument which the defendant sought to found upon that section is fully answered by the Distribution of German Property Act, 1949, and the General Order made thereunder. In any event, I do not accept Mr. Mould's contention that, on the true construction of section 7 of the Act of 1939, the Board of Trade could not authorize the custodian to sell any enemy property which had become vested in him unless such property was of a perishable or wasting nature."

[Report: [1954] Ch. 50.]

Trading with the Enemy—Agency of Bank Having Nationality of Enemy State—Liquidation of—Claim of Non-Enemy Creditor Against Bank—Preferred Claim under Law of State of the United States—Power of Alien Property Custodian to Seize Funds to be Applied to Such Preferred Claim—The Law of the United States of America.

BROWNELL *v.* SINGER.

United States, Supreme Court of New York, Special Term, New York County. February 9, 1951.

Supreme Court of New York, Appellate Division. November 5, 1952.

Court of Appeals of New York. July 14, 1953.

Supreme Court. April 5, 1954.

(Black, Reed, Frankfurter, Douglas, Jackson, Burton, Clark and Minton JJ.)

THE FACTS.—The Yokohama Specie Bank had established an agency in New York pursuant to a statute of that State which provided that the assets of the Bank in that State should be subject to the claims of creditors arising out of transactions with the New York agency in preference to other claims. On December 8, 1941, when war was declared with Japan, this agency was in the possession of the United States Treasury, which was supervising freezing controls over Japanese nationals. The agency was immediately surrendered to the Superintendent of Banks of New York for liquidation under State law.

The Standard Vacuum Oil Company, a Delaware corporation, filed a claim against the Bank, and it was rejected. The claim was assigned to one Singer, who brought suit thereon. After considerable litigation it was determined that the Banking Law of New York required that the property of the Bank be applied to the payment of creditors who had preferred claims against the Bank arising out of transactions with its New York agency, that the plaintiff's assignor was such a creditor, and that the claim of the plaintiff should be paid out of the assets of the Bank, subject to the requirement of obtaining a federal licence. (*Lyon* v. *Singer*, 339 U.S. 841, 94 L.Ed. 1323, 70 Sup Ct. 903 (1950)).

The plaintiff then filed an application for such a licence. The Office of Alien Property thereupon directed the Superintendent of Banks to turn over to the Attorney-General of the United States the sum of $557,561.25, which had been set aside as a reserve for the payment of Singer's claim, on the ground that the fund was the property of an enemy national.

The Superintendent of Banks applied for an order authorizing him to comply with the directive of the Office of Alien Property and to release and discharge him from compliance with the judgment of the Court. The Superintendent contended that the determination of the Alien Property Custodian that property is that of an enemy national is conclusive for the purposes of taking possession under the Trading With the Enemy Act and that the rights of creditors are fully protected by the exclusive procedure provided by the Act.

Held (by the Supreme Court of New York, Special Term, *sub nom. In re Yokohama Specie Bank, Ltd.*): that the application of the Superintendent of Banks must be denied. The plaintiff was a preferred creditor whose claim had been judicially determined and reduced to judgment, and the fund to meet his claim accordingly could not be turned over to the Alien Property Custodian, notwithstanding the fact that payment could not be made until the granting of a federal licence.

The Court said: " In support of the application, the moving parties rely upon *Matter of Yokohama Specie Bank* (188 Misc. 137, Shientag J.) which holds that the determination of the Alien Property Custodian that property is that of an enemy national is ' conclusive ' for the purposes of his taking possession under the provisions of the Trading with the Enemy Act (U.S. Code, tit. 50, Appendix, § 1 *et seq.*) and that the rights of those who claim an interest in the property are fully protected by the exclusive procedure provided in the Federal act (p. 140).

" But the *Yokohama* case (*supra*) is distinguishable. There, the application was opposed by persons who sought to have their interest in the property involved judicially determined before its seizure by the Alien Property Custodian. All the other cases upon which the applicants rely (most of which are cited in the *Yokohama* decision), are equally distinguishable upon the same ground.

" Here, the application is opposed by a preferred creditor whose claim has been judicially determined and reduced to judgment. The judgment directs that the claim be paid out of the funds of the Yokohama Bank in the possession of the Superintendent of Banks, as liquidator, and the Superintendent of Banks, in accordance with the judgment, has allocated and set aside funds to pay the claim.

" Nor are the funds so allocated and set aside, as the moving parties urge, ' excess proceeds ' of the property of the Yokohama Bank remaining in the possession of the Superintendent of Banks after the payment of the claims of creditors in accordance with the Banking Law. In other words, the fund is not part of the ' excess proceeds ' which the Alien Property Custodian vested in himself by the 1943 vesting order. Nor is the fund the property of an enemy country or a national thereof. The assertion of the Alien Property Custodian that it is such property is contrary to the fact as judicially determined, and, therefore, cannot be given the force and effect of a ' conclusive determination ', as the moving parties argue.

" The Attorney General takes the position that, since the payment of the claim is subject to the provisions of Executive Order

No. 8389 and cannot be paid until an appropriate Federal license is obtained, and since Singer's application for such a licence has been 'finally denied', Singer's claim is nothing more than a 'non-payable and unenforceable' claim. With that conclusion I am unable to agree. While the claim cannot be paid until the appropriate Federal license has been obtained, this does not authorize a demand that the fund be turned over to the Alien Property Custodian. And while 'federal control over alien property remains undiminished' (*Lyon* v. *Singer*, 339 U.S. 841, 842, *supra*), so long as payment of the claim is conditioned upon obtaining the Federal license, I do not understand this to mean that the granting of the license may be arbitrarily or capriciously withheld, or that it requires that the fund be turned over to the Alien Property Custodian." [The Court went on to say that it was without authority to disobey the mandate of the Court of Appeals, which resulted from the previous litigation culminating in *Lyon* v. *Singer*, *supra*.]

[Reports: 200 Misc. 610, 103 N.Y. Supp.2d 228.]

On appeal, the order of the Supreme Court made at Special Term was affirmed *per curiam* by the Appellate Division of the Supreme Court (280 App. Div. 970, 116 N.Y.S.2d 926) and by the Court of Appeals (305 N.Y. 908, 114 N.E.2d 469).

The Attorney-General petitioned for *certiorari* to the Supreme Court and the writ was granted (346 U.S. 895, 98 LEd. 397, 74 Sup.Ct. 223).

Held (by the Supreme Court *per curiam*): that the judgment of the Court below must be reversed on the authority of *Zittman* v. *McGrath*, 341 U.S. 471, 95 L.Ed. 1112, 71 Sup.Ct. 846 (1951), wherein it was held that the Alien Property Custodian had the power to take possession of the accounts of an enemy national in the Federal Reserve Bank of New York, notwithstanding the attachment of these funds by creditors as the result of a judgment of a court of New York.

Jackson J., with whom Frankfurter and Douglas JJ. joined, dissented on the ground that the rights of creditors should, consistently with the prior holding of the Supreme Court in *Lyon* v. *Singer* and the policy theretofore followed by the Alien Property Custodian, be accorded preference over the demand of the Alien Property Custodian. He said: "The Court's one-word decision reverses concurring judgments of three highly respected courts—the Court of Appeals of New York, the Appellate Division of the Supreme Court, First Department, and the Supreme Court, Special Term, New York County. It cites a single case, the implication being that the cited authority settled the question so fully and plainly that a contrary result could have been reached by the three lower courts only by failure to read or heed it. I think this Court owes those courts and the legal profession something more than a reference to an inapplicable decision. The facts of this case present novel questions that this Court should face and on which it should render a reasoned decision.

" . . . .

" In 1942, the President, pursuant to statutory authority, created the Office of Alien Property Custodian. As to property in the process of administration under judicial supervision, the Custodian was authorized to seize only that ' which is payable or deliverable to, or claimed by, a designated enemy country or national thereof.' This fund, earmarked for payment to an American creditor, is not within that description. No other authority for demanding its turnover can be found.

" In September of 1942, the Custodian asserted power of supervision over the liquidation of the New York agency but advised the Superintendent of Banks to continue his liquidation of the business and property in New York. He requested the Superintendent to advise him of all claims which he intended to accept and to notify him when he had liquidated assets sufficient to pay and had paid all accepted and established claims and expenses of liquidation in order that the Custodian might take such action ' at that time with respect to the assets remaining in your hands ' as he might deem necessary. Thereafter, as various claims were allowed payable to preferred creditors who were enemy nationals, the Custodian issued vesting orders seizing such funds as were set aside for their payment. Of course, he cannot seize this claim on such a basis, for the claimant is not an enemy alien.

" On February 15, 1943, the Custodian issued vesting order No. 915. By it, he only purported to vest in himself the excess proceeds of the liquidation remaining after the payment of creditors having claims accepted or established in accordance with the Banking Law of New York. Since such excess funds, under that law, were payable to the Japanese bank, this was obviously a proper vesting. But the limitation of the vesting order to such excess was no accident or oversight. In annual reports to the President and Congress, the Custodian repeatedly stated, in substance, that rights of creditors preferred by state laws would be respected, and only the excess vested.

" The turnover order now sustained by the Court is quite contrary to this policy and was not issued until September 5, 1950, over five years after the cessation of hostilities with Japan and over eight years after the task of administration was left to the Superintendent of Banks.

" The fund of over a half-million dollars which the Attorney-General as successor to the Alien Property Custodian now demands be paid over to him is a fund specifically held and earmarked by the Superintendent of Banks for the payment of the claim which we have previously upheld as entitled to a preference under New York law. *Lyon* v. *Singer, supra.*

"All funds in the hands of the Superintendent in excess of allowed or established claims have been demanded by the Custodian, and the New York Supreme Court has authorized their payment, as under New York law such excess is payable to the Japanese bank. The New York courts, however, have refused to allow the Superintendent to turn over the funds allocated to the satisfaction of the judgment in favor of respondent and affirmed by us, to be paid if and when licensed by the Attorney General.

"*Zittman* v. *McGrath*, 341 U.S. 471, cannot serve as a supporting authority for this decision. In *Zittman* the Custodian demanded transfer of a credit from a debtor bank which had no interest in the credit except that of a stakeholder. Here the Custodian would seize a fund from an officer of the State of New York who is administering it pursuant to his statutory duty and under the supervision of the Supreme Court of that State. In *Zittman* the claims adverse to the Custodian rested on an assertion of private rights and in no other way involving the public interest. Here there is a clash between two public interests. New York, through its Superintendent of Banks, took possession of the Yokohama Bank assets for administration pursuant to its own public policy of protecting creditors of institutions allowed to do business in the State of New York. After a lapse of many years, the Attorney General now would seize it from him to apply a different public policy—that of the Federal Government.

"Moreover, in *Zittman* the vesting order specifically vested debts owed to a foreign national by a New York debtor bank and debts evidenced by instruments endorsed by the foreign national and held by a Federal Reserve Bank. Those debts constituted the precise funds sought by the litigant. In this case, the vesting order purported to vest only such excess proceeds as remained after payment of established claims, and respondent shows that his is such a claim. His position, that the funds he seeks were never vested by the Custodian, is not analogous to that of the petitioner in *Zittman.*

"Some effort was made on argument to reconsider whether this claim is entitled to a preference under the Banking Law of New York. The claim arose out of a foreign exchange transaction. Prior to the war, the Standard Vacuum Oil Company was delivering oil to Japanese purchasers who paid in yen. It is not questioned that such sales were in accordance with the national policy of the United States at that time. Standard entered into an agreement with the Yokohama Bank under which it sold the yen to the bank in Japan and was to receive credit in dollars in New York. This manner of remitting funds was conventional and was the function which the New York branch of a foreign bank would be expected to facilitate. The New York courts held that creditors created by such a foreign exchange transaction, including respondent, were among those whom the New York statutes sought to protect out of the New York assets. In the *Singer* case, *supra*, we approved that holding. Unless every principle of *res judicata* is to be disregarded by this Court, it is bound by its holding that this is a preferred claim under the New York Banking Law.

" It was intimated in argument that the purpose of seizure of this fund is to defeat the preference for this claim in the interest of other creditors outside of New York who will not be paid in full. This would mean a distribution of the New York assets at odds with the New York Banking Law. But it is apparent that a large number of New York creditors have been paid in full from the New York assets, and just why this creditor, who stands on an equality with them, should be deprived of his claim of preference while the others retain theirs is hard to understand.

" This Court has been rather insistent that state courts disclose the reasoning behind their judgments.* I think the Court should reciprocate when faced with issues as serious and as doubtful as those raised in this case."

[Reports: 347 U.S. 403, 98 L.Ed. 803, 74 Sup.Ct. 548.]

Trading with the Enemy—Licence to Trade—Whether Conferring Right to Sue.

See p. 622 (*Schering A.G.* v. *Pharmedica Property Ltd.*).

VI.—Enemy Character

ii.—Of Corporations

Enemy Character—Of Corporations—Test of Control—Swiss Company—Validity in Allied Country of Confirmation of Character by Commission set up under Washington Agreement of 1946.

SOCIÉTÉ ANONYME ÉTABLISSEMENTS AEROXON *v.* OFFICE DES SÉQUESTRES.

Belgium, Court of Cassation. September 17, 1953.

THE FACTS.—The appellant Company was a subsidiary of the holding Company " Orion ". Until July 1939, the entire share capital of the latter Company was in the hands of two German nationals. On that date they transferred 80 per cent. of the shares to a Swiss national. On the outbreak of war the Custodian of Enemy Property nevertheless placed the assets of the appellant Company under sequestration, on the ground that the apparent transfer of control was not genuine. The appellant Company now sought to obtain a ruling that its assets were not enemy property. It relied on the following arguments: (1) In application of the Agreement concerning Reparations, signed at Paris by the Western Allies on January 14, 1946, an Agreement was concluded with Switzerland at Washington on May 25, 1946, for the liquidation of German property situate in Switzerland. A mixed Allied-Swiss Commission, set up under that Agreement, had on March 13, 1948, approved a decision of the *Office Suisse de Compensation* to the effect that 80 per cent. of the shares of the Orion Company belonged to Swiss nationals and that the Company must accordingly be considered to be a Swiss company. That Commission was competent under international agreements to which Belgium was a party, and its decision must accordingly be recognized. (2) The property in the share capital of the Orion holding Company had passed to a Swiss national, a certain Spahn. He alone could hereafter control the assets of that Company. They could accordingly not be sequestrated on the ground that they were under enemy control.

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* *E. g.*, *Minnesota* v. *National Tea Co.*, 309 U. S. 551; *Loftus* v. *Illinois*, 334 U. S. 804; *Chicago* v. *Willett Co.*, 341 U.S. 913.

In a judgment of October 13, 1951, the Court of Appeal of Brussels rejected these arguments. It held, first, that the Washington Agreement of 1946 applied only to assets situate in Switzerland, and could not affect the position of property situate in Belgium. Secondly, it held that the shares in the Orion holding Company had at all times been at the disposal of the original owners, who were German nationals. The present action was an appeal from that decision.

Held: that the appeal must be rejected. Belgian authorities were not bound to apply, in regard to property situate in Belgium, the decision of a Mixed Commission appointed under the Washington Agreement. Enemy-owned assets of Belgian companies were placed under sequestration in Belgium, even if the securities representing them were abroad. The appellant Company was at least under indirect enemy control, and this justified the placing of its assets under sequestration.

The Court said: " The Washington Agreement refers exclusively to German property situate in Switzerland. It appears from its terms that it is not applicable to assets situated in the territory of one of the Allied Powers Signatories of the Agreement, and that it does not affect measures which such a Power may consider it appropriate to take with regard to such assets. The decision of the Mixed Commission is thus not binding on the Belgian Government or on Belgian courts so far as concerns the application of provisions concerning sequestration to the assets of the Aeroxon Company on Belgian territory.

" It is irrelevant in this connection where the shares of the appellant Company are. Article 2 of the Law of July 14, 1931, applicable in Belgium as from September 4, 1944, provides that German interests in Belgian companies are placed under sequestration in Belgium even if the securities representing them are abroad. . . .

" The Court below, as the final judge of the facts which it found to be admitted by both parties, declared that the sale of shares by the brothers Kaiser was not a genuine operation, that Spahn, who for many years had been the close associate of the brothers, at no time exercised the rights of ownership supposedly transferred to him, except in appearance; that Spahn carried out the instructions of the brothers Kaiser in order to safeguard them against any action, German or Allied, which could cause them prejudice. The Court admits that it is possible that, in Swiss law, the ownership of the contested shares passed from the brothers Kaiser to Spahn. However, this would not make inapplicable Article 1 of the Decree-Law of August 23, 1944, concerning the sequestration of enemy property, since the shares at all times remained at the disposal and under the control of the brothers Kaiser. The judgment of the Court below is thus amply justified.

" It appears from the judgment appealed against that the appellant Company was under the control of the holding company Orion, which, in turn, was at all times under the control of the brothers Kaiser. The Court thus found impliedly, but unambiguously, that the appellant Company was under at least the indirect control of German subjects, which justified its being placed under sequestration."

[Report: *Pasicrisie belge*, 1954, I, p. 1.]

iv.—Of Goods

Enemy Character—Of Property—Property Seized by Enemy Company in Violation of International Law.

See p. 622 (*Société Anonyme Pneumac* v. *Société Anonyme Belge du Pneumatique Michelin*).

XI.—Non-hostile Relations between Belligerents, especially Armistices

War—Armistice—Unconditional Surrender—Effect on Belligerent Rights—Effect on Seizures in Prize—Unconditional Surrender of Germany, 1945.

See p. 667 (*Schiffahrt-Treuhand and Others* v. *Her Majesty's Procurator-General*).

XII.—Termination of War

War—Termination of—Cessation of Hostilities—Effect on Statute of Limitations as Regards Action by Resident of Territory Which Had Been Occupied by the Enemy—The Law of the United States of America.

SESE *v.* UNITED STATES.

United States, Court of Claims. July 13, 1953.

THE FACTS.—This was an action filed on December 31, 1952, by a citizen and resident of the Republic of the Philippines to recover $54,500, plus interest thereon, alleged to have been loaned in 1943 to a recognized guerrilla unit known as " Hunters ROTC Guerrillas ". This organization was engaged in hostilities against the Japanese forces then occupying the Philippines. The United States moved to dismiss the petition on the ground that the claim was barred by the statute of limitations of six years applicable to claims within the jurisdiction of the Court of Claims.

On the defendant's motion to dismiss,

Held: that the plaintiff's petition must be dismissed. The plaintiff had access to the Court of Claims on and after September 2, 1945, the date of the surrender of Japan, notwithstanding the fact that the cessation of hostilities had not been proclaimed by the President of the United States until December 31, 1946. Although during the period of occupation the Philippine Islands were considered to be enemy territory, the termination of enemy control of the area destroyed any need for imposing upon its citizens and residents the restrictions applicable to enemy nationals.

The Court said: " . . . In *Marcos* v. *United States,* 102 F.Supp. 547, 122 Ct.Cl. 641, we held that the wartime suspension of the statute of limitations in the Philippines was lifted on September 2, 1945, the date of formal surrender of the Japanese, 59 Stat. 1733, because access to this court by Filipinos had once again become possible. [See *International Law Reports,* 1952, Case No. 119.]

" Applying the rule of the *Marcos* case in *Tan* v. *United States,* 102 F.Supp. 552, 122 Ct.Cl. 662, *certiorari* denied 344 U.S. 895, 73 S.Ct. 275, we held that a petition filed on August 14, 1951, based on a cause of action accruing no later than November 3, 1941, was barred by the statute of limitations,[1] and that the pendency of Tan's claim before the Army Claims Service in the Philippines did not further toll the statute.

" Plaintiff herein has urged this court to reconsider its decisions in *Marcos* and *Tan* in the light of cases and authorities not previously cited to the court and which plaintiff believes establish (1) that his cause of action did not actually accrue until a date well within the statutory period as determined by the *Marcos* case, and (2) that in any event, if the cause of action should be held to have accrued prior to September 2, 1945, the suspension of the statute of limitations was not lifted until at least December 31, 1946, the date of the President's Proclamation No. 2714, 61 Stat. 1048, 50 U.S.C.A. Appendix, § 601 note, officially declaring a 'Cessation of Hostilities of World War II' . . . .

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[1] Even deducting the entire period of hostilities in the Philippines up to the date of the formal surrender of the Japanese, the petition in the *Tan* case was filed more than six years from November 3, 1941.

" After a careful consideration of all of plaintiff's arguments and authorities, we can see no circumstance in this case which prevented the accrual of plaintiff's right of action immediately upon the delivery of his money to the guerrilla officer, and but for the existence of the hostilities, plaintiff might legally have instituted suit upon such claim at that time. Inasmuch as plaintiff's claim accrued during the wartime hostilities in the Philippines, the statute of limitations did not commence to run against the claim until plaintiff had access to this court, which date we held in the *Marcos* case to be September 2, 1945. Unless the present plaintiff was still denied access to the court on that date, his claim was barred by September 2, 1951, several months before his petition was filed.

" In connection with the date of September 2, 1945 selected by the court in the *Marcos* case, plaintiff urges that hostilities in the Philippines cannot be said to have ceased with the formal surrender of the Japanese on that date, but only at the time of the Presidential Proclamation of December 31, 1946, supra. In holding that the statute of limitations commenced to run on September 2, 1945, we were not determining that all hostilities in the Philippines had ceased. We merely held that under all the circumstances of record in that case, it appeared that plaintiff had access to this court on and after September 2, 1945.

" In a supplemental memorandum filed by plaintiff in further support of its contention that the statute of limitations was suspended with respect to the Philippines until the date of the President's proclamation on December 31, 1946, declaring hostilities with Japan to be at an end, our attention is called to several Civil War cases in which it was held that the statute was suspended until the dates of the President's proclamations declaring the war to have ended, and certain other cases in which the courts held that for purposes other than the statute of limitations, World War I continued until the signing of the treaty of peace.

" In the Civil War cases, exemplified by *The Protector*, 12 Wall. 700, 20 L.Ed. 463 the court noted that the various acts of hostility occurred in parts of the country far removed from each other, at various periods of time and of different degrees of importance so that it was very difficult to determine on what precise date the war began or ended. The President had issued two proclamations declaring the war closed, one in April 1866 for ten of the southern states, and one in August for Texas. In holding that the statute of limitations was suspended until those two dates, depending upon the state involved, the court stated:

> ' *In the absence of more certain criteria*, of equally general application, we must take the dates of these proclamations as ascertaining the commencement and the close of the war in the States mentioned in them.' [12 Wall. at page 702, italics supplied.]

" If, in the *Marcos* case and the present case, there had been that same ' absence of more certain criteria ', the date of the presidential proclamation might well have furnished the only solution. However, as pointed out in the *Marcos* case, there are sufficient facts both of record and of which the court may take judicial notice to justify the holding that for most practical purposes the courts of the United States were open to Filipinos by September 2, 1945, more than a year prior to the President's proclamation that hostilities between the United States and Japan had ceased.

" In *Hamilton* v. *Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 40 S.Ct. 106, 111, 64 L.Ed. 194, the validity of the War Time Prohibition Act, 40 Stat. 1045, 1046, was challenged on the ground that there no longer existed a sufficient war emergency to justify its enforcement. In upholding the validity of wartime legislation the courts have gone far in finding the continued existence of war emergency after actual hostilities had ceased because, as noted by the Supreme Court in the Hamilton case:

> ' . . . every reasonable intendment must be made in favor of its continuing validity, . . . that to Congress in the exercise of its powers, not least the war power, upon which the very life of the nation depends, a wide latitude of discretion must be accorded; and that it would require a clear case to justify a court in declaring that such an act, passed for such a purpose, had ceased to have force because the power of Congress no longer continued.'

The court held that sufficient facts had been called to its attention, including the fact that no treaty of peace had been concluded, that the railways were still under national control by virtue of the war powers, and that other war activities had not been brought to a close, to justify the continued validity of the Prohibition Act. (Plaintiff's injunction suit was brought on October 10, 1919.) We doubt that the same factors which persuaded the Supreme Court that a sufficient war emergency still existed to validate the enforcement of wartime legislation would have been considered relevant on the issue of the lifting of the suspension of the statute of limitations had such issue been before the court.

" In *Kahn* v. *Anderson*, 255 U.S. 1, 41 S.Ct. 244, 226, 65 L.Ed. 469, it was contended by the applicants for a writ of *habeas corpus* that the Court Martial had no power to try them for murder at the time of the trial which they contended was ' in time of peace.' In denying the application, the court pointed out that complete peace in the legal sense was not brought about by the Armistice and the cessation of hostilities, citing the *Hamilton* case, supra, and that when the Articles of War, 1916, used the term ' in time of peace', peace in the complete sense, officially declared, was intended. The case did not involve the issue of the lifting of the suspension of the statute of limitations but rather the interpretation of a provision in the 1916 Articles of War.

" In *First National Bank of Pittsburgh* v. *Anglo-Oesterreichische Bank*, 3 Cir., 37 F.2d 564, the court held that where the plaintiff was an alien enemy under the definitions of the Trading with the Enemy Act, 50 U.S.C.A.Appendix, § 1 et seq., the statute of limitations applicable to its claim against a United States national was suspended until treaty of peace was concluded between the United States and plaintiff's country because until that time plaintiff had the status of an enemy alien and the courts of the United States were closed to it.

" We think the *First National Bank* case is clearly distinguishable from the instant case. The Philippines was in no real sense an enemy country and a treaty of peace was never contemplated between the United States and the Philippines. During the period of Japanese occupation of the Islands, the Philippines was considered to be ' enemy territory ' because it was enemy occupied. During such occupation our courts were closed to Filipinos resident in the Islands on the theory that such persons were under the control of the enemy. Upon the surrender of the common enemy, the Japanese, and even prior thereto, many wartime restrictions on communications with the Philippines were lifted, and once organized enemy control of the Islands was deemed to have been substantially at an end, that country was no longer deemed to be ' enemy territory ' and there was no longer any need for imposing upon its citizens and residents the restrictions applicable to enemy nationals. . . .

" Under all the circumstances we find no basis for modifying the conclusions reached in the *Marcos* and *Tan* decisions, and accordingly we hold that plaintiff's cause of action accrued at the time the loan was made, that the statute of limitations was suspended on his claim until September 2, 1945, and that his claim filed more than six years from that date is barred. Plaintiff's petition is dismissed."

[Reports: 125 Ct.Cl. 526; 113 F.Supp. 658.]

NOTE.—A number of like petitions were on the same day dismissed on the same grounds as in the *Sese* case. See *Norega* v. *United States* (125 Ct. Cl. 541; 113 F. Supp. 463); *Porras* v. *United States* (125 Ct. Cl. 545; 113 F. Supp. 664); *Angeles* v. *United States* (125 Ct. Cl. 546; 113 F. Supp. 665); *Tabacug* v. *United States* (125 Ct. Cl. 545; 113 F. Supp. 666); *Land Settlement & Development Corp.* v. *United States* (125 Ct. Cl. 543; 113 F. Supp. 666); *Martin et Al.* v. *United States* (125 Ct. Cl. 548; 113 F. Supp. 669); *De Rubin et Al.* v. *United States* (125 Ct. Cl. 542; 113 F. Supp. 668); *Silva* v. *United States* (125 Ct. Cl. 550; 113 F. Supp. 670); *Lindayag et Al.*

v. *United States* (125 Ct. Cl. 549; 113 F. Supp. 671); *Ramcar, Inc.* v. *United States* (125 Ct. Cl. 547; 113 F. Supp. 672); *Anno* v. *United States* (125 Ct. Cl. 535; 113 F. Supp. 673).

The *Sese* case is noted in *Michigan Law Review*, 52 (1954), p. 916.

War—Termination of—Cessation of Hostilities—Trading with the Enemy—Licence to Trade—Whether Conferring Right to Sue.

SCHERING A.G. *v.* PHARMEDICA PROPERTY LTD.

Australia, Supreme Court of New South Wales.

(Roper C.J. in Equity.)

October 17 *and November* 7, 1950.

THE FACTS.—At the time this action was brought a state of war still existed between Australia and Germany, although actual hostilities had ceased. The plaintiff was incorporated in Germany and was the registered proprietor in the Commonwealth of Australia of the trade mark " Testoviron ". The plaintiff sold a product in New South Wales known as " Testoviron ", which was put up in packages bearing distinctive labels prominently displayed thereon and bearing the name of the plaintiff. The defendant was a company incorporated under the provisions of the Companies Act, 1936–1940, of New South Wales, carrying on business throughout New South Wales manufacturing, selling and distributing medicinal products. The plaintiff alleged that the defendant was selling and offering for sale in New South Wales products not of the plaintiff's manufacture but nevertheless under the name of " Testoviron " and put up in containers bearing labels, both the containers and the labels being substantially identical with the plaintiff's containers and labels. The plaintiff accordingly sought an interlocutory injunction to restrain the infringement of a trade mark and passing off. The defendant entered a preliminary objection that the plaintiff, being a German company and an enemy alien, had no capacity to maintain the suit. The defendant further alleged that the property in the trade mark was not the property of the plaintiff since it was subject to expropriation and since the Court should not enforce rights which it was plain were liable to be expropriated. The plaintiff maintained that when hostilities cease trading with the enemy may recommence, and that in any event there was evidence that the plaintiff company possessed a licence to use the mark and to trade.

Held: that although the conflict of armed forces had ceased, a state of war continued to exist between the Commonwealth of Australia and Germany, and therefore the plaintiff, being an alien enemy, could not maintain the action.

The Court said: " The plaintiff in this suit is seeking an interlocutory injunction to restrain the infringement of a trade mark and passing off. The defendant has taken what has been styled a preliminary objection, although I think it is in fact really an objection by way of demurrer, namely, that the plaintiff is an alien enemy and is not entitled to maintain the suit, and consequently, of course, not entitled to move this particular motion. . . .

" The question which has been argued, and which is quite an interesting one, is whether, assuming that the plaintiff was an alien enemy up to the stage in the present war when actual armed conflict between the forces of Australia and Germany ceased, he has either ceased to be an alien enemy because of the cessation of armed conflict or ceased to be under the disability from maintaining actions in our courts because of that cessation, notwithstanding that the countries are still in a state of war. It has been conceded on the part of the plaintiff that this country and Germany are still in a state of war, and it has been conceded on the part of the defendant that what have been called, I think possibly wrongly, ' hostilities ' —which was intended to indicate the actual clash of armed forces— have ceased. The use of the word ' hostilities ' is, I think, of some interest, because it is a word that is used in a number of judgments, and is used at times to indicate that upon the cessation of hostilities the disability which attaches to an alien enemy preventing [him] from suing in our courts, or perhaps the character of alien enemy itself, ceases. The word, however, I think, is not necessarily used in the judgments in question—in particular in the case of *Alcinous* v. *Nigreu*[1] and *Porter* v. *Freudenberg*[2]—to mean merely the conflict of armed forces. To my mind it may well be said that acts of hostility are proceeding when the armed forces of one country occupy another country and control it, and do so after that other country has surrendered its own armed forces and agreed no longer to fight a war. However that may be, the question here is one which, in my opinion, can be resolved substantially by reference to one particular authority which impresses me as much as any of the authorities which have been put before me, and that is the case of *The Hoop*.[3] Two passages are referred to from the judgment of Lord Stowell or, as he [then] was, Sir W. Scott. The first, of course, must be read with the due modification that we are speaking of the State of New South Wales and not of England, and it is this:

> " ' By the law and constitution of this country, the sovereign alone has the power of declaring war and peace. He alone therefore who has the power of entirely removing the state of war, has the power of removing it in part, by permitting, where he sees proper, that commercial intercourse which is a partial suspension of the war . . .' "[4]

" Pausing there, I should also add a reference to the passage from the decision of the House of Lords in *Janson* v. *Driefontein Consolidated Mines, Ltd.*[1] where Lord Macnaghten said:

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[1] (1854) 4 E. & B. 217; 119 E.R. 84.
[2] [1915] 1 K.B. 857.
[3] (1799), 1 Ch. Rob. 196 at p. 199.
[4] *Ibid.*

> " ' I think the learned counsel for the respondent was right in saying that the law recognises a state of peace and a state of war, but that it knows nothing of an intermediate state which is neither the one thing nor the other—neither peace nor war.' "

The second passage in the case of *The Hoop*[2] is as follows:

> " ' In the law of almost every country, the character of alien enemy carries with it a disability to sue, or to sustain, in the language of the civilians, a *persona standi in judicio*. The peculiar law of our own country applies this principle with great rigour. The same principle is received in our courts of the law of nations; they are so far British courts, that no man can sue therein who is a subject of the enemy, unless under particular circumstances that *pro hac vice* discharge him from the character of an enemy; such as his coming under a flag of truce, a cartel, a pass, or some other act of public authority that puts him in the king's peace *pro hac vice:* but otherwise he is totally *ex lex*.'

" That, I think, must be the position here. The fact is that a state of war still exists between this country and Germany, so that the plaintiff is still an alien enemy, and there is nothing on the face of the statement of claim to indicate that he has acquired the right to sue by some act of a public authority or by some licence, either express or implied, entitling him to come here and maintain this action. I therefore think that the plaintiff is disabled, so far as the facts appearing at present on the statement of claim are concerned, from maintaining this action.

" An argument was addressed to me that the position may be that the property in the trade mark is no longer the property of the plaintiff at all—that it has already been expropriated. So far as the material before me in respect of this argument is concerned, I may say that I see nothing to indicate that the Acts and regulations which have already been passed in relation to enemy property have operated to take way the proprietary rights in the trade mark from the plaintiff. I may say, however, that it would appear to be curious that the right to sue in respect of the trade mark or in respect of any other proprietary right might be restored to an alien enemy—that is, that the disability might be removed by the cessation of armed conflict—whilst if and when peace is made the particular property in question might well be dealt with under the terms of the Peace Treaty itself, and dealt with in such a way as to remove it from the plaintiff.

" It has been put on behalf of the plaintiff that there are facts—either a course of conduct or perhaps even legislation—which show that the plaintiff in this case has in fact a licence to use this mark and to deal with and to trade in this country, and that that licence would carry with it, either expressly or by implication, the right to sue so as to protect the mark and protect his trade in this country. If that is so, then I think the statement of claim should be amended either to allege generally that he has a licence or to allege the particular matters which are relied upon as constituting the licence.

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[1] [1902] A.C. 484, at p. 497.

[2] (1799) 1 Ch. Rob. 196, at pp. 200–201.

" I think that I should treat this objection as in fact a demurrer. I uphold it so far as the present statement of claim is concerned, but I think that the plaintiff should have an opportunity to amend the statement of claim if he sees fit to do so."

In pursuance of leave granted in the above decision the plaintiff Company amended its statement of claim, *inter alia*, (a) by adding a paragraph thereto alleging that at all material times it carried on and was still carrying on an extensive business in manufacturing pharmaceutical and medicinal products which had been and then were being sold and delivered to persons and corporations in, among other countries, New South Wales and the Commonwealth of Australia; (b) by alleging a proclamation by the Governor-General, purporting to have been made on June 1, 1949, in pursuance of the Trading with the Enemy Act, 1939, s. 15, which, *inter alia*, exempted from the provisions of that Act " trade with or for the benefit of any government, public or other authority in Germany, with or for the benefit of any individual resident in Germany, or with or for the benefit of any individual or body of persons (whether corporate or unincorporate) carrying on business in Germany, in pursuance of an agreement or contract made or entered into after the date of this licence "; and (c) by adding a paragraph alleging that since, in or about the month of August 1949, the plaintiff's products had been sold and delivered to persons or corporations in New South Wales and had been so sold and delivered in pursuance of agreements made and entered into since June 1, 1949.

The application thus came again before the Court.

Held: that the transactions involved in the action were covered by the licence to trade, and that, therefore, the plaintiff had the right to maintain an action to protect such trade as licensed.

The Court said: " This is an application for an interlocutory injunction in a suit in which the plaintiff is an enemy alien. The injunction is sought to prevent certain alleged passing off and also to prevent the infringement of the trade mark of the plaintiff. When the matter first came before the court, a preliminary objection, or perhaps strictly, a demurrer *ore tenus* was taken to the statement of claim as it then stood upon the ground that it appeared from the statement of claim that the plaintiff was an alien enemy, not a resident of this country, and that there were no circumstances which permitted the plaintiff to sue in the King's Court. I upheld that objection or demurrer and gave my reasons for it at the time. It was then suggested that the plaintiff might be able to amend so as to allege a licence permitting it to trade in this country and permitting it to sue, and consequently, instead of dismissing the suit at that stage, the plaintiff was given liberty to amend, if so advised.

" The matter now comes before the court on an amended statement of claim for the same interlocutory injunctions as were sought in the first instance and the first question to be decided is whether, having regard to the amendments, the plaintiff has overcome the difficulty which I thought existed before and is now capable of maintaining this action. The amendments show that on 1st June, 1949 the Governor-General of the Commonwealth issued a proclamation under the provisions of s. 15 of the Trading with the Enemy Act 1939. Under that provision it is enacted that the Governor-General might by licence under his hand exempt any particular transaction or classes of transactions from the provisions of the Act. Apparently some prior licence had been issued under the section, and the licence issued on the 1st June revoked that and proceeded to grant a new licence. The new licence purports to exempt from the provisions of the Trading with the Enemy Act certain, what I shall call, classes of transactions which include —and this, I think, is the vital one for the purpose of this case— ' trade with or for the benefit of any government, public or other authority in Germany, with or for the benefit of any individual resident in Germany, or with or for the benefit of any individual or body of persons (whether corporate or unincorporate) carrying on business in Germany, in pursuance of an agreement or contract made or entered into after the date of this licence'.

" The exemption, then, is an exemption of trade in the circumstances of this case with or for the benefit of a corporate body which carries on business in Germany. The language of the provision which I have read appears to me to be peculiar in that it appears to be more directed to licensing the Australian to trade with the German rather than licensing the German to trade with the Australian. I think, however, that it must be taken that the trade must create the reciprocal body of relations which occurs in all trade, and that, consequently, a licence is given not merely to an Australian—by an Australian I mean a person resident here—to trade with a German but also to a German to trade with an Australian. There is a proviso to which I should make some reference, because it also is couched in language which I find somewhat difficult to understand. I think, however, that the proviso must be read subject to some sort of limitation, either that it means that the German is not entitled under the licence to trade in Australia in respect of any property belonging to the German which is already in this country at the time that the licence was granted, or, alternatively, that the German is not allowed to enter into any local trade, but is only allowed to trade in the sense of sending goods to Australia or exporting goods from Australia.

"However that may be, I think that the nature of the transactions which are in issue in this suit, which is in respect of an exporting business from Germany into Australia, is clearly covered by the licence. It was submitted that if that was so, or whether that was so or not, the licence is *ultra vires* the provisions of the section, because the section, as it was submitted, merely permitted the Governor-General by licence to exempt any particular transaction or class of transactions from the Act, and did not permit him generally to exempt the whole field of trade or trade with particular persons from the Act. So far as I can see, the power to exempt any particular transaction or class of transactions is a power wide enough to permit the exemption of the class of transaction that is described or set out in this particular licence.

"The next question that arises is whether, if the trade in question is licensed because of this licence, that permits the alien enemy to maintain a suit in respect of it in these courts. The matter has not, apparently, been the subject of an express decision. Some reference was made to it in the decision of the Court of Appeal in *Wolf and Sons* v. *Carr Parker & Co., Ltd.*[1], but the matter in that decision was left completely open. It is, of course, clear that where an enemy alien is present in this country by licence he is entitled to sue without having the necessity of obtaining an express licence permitting him to sue. In my opinion, where an enemy alien is entitled to trade in this country, that is, by licence from the Crown, the granting of the licence itself puts him, as it was expressed in the case of *The Hoop*[2], 'in the King's peace *pro hac vice*', and, consequently, in respect of his trade he is to be regarded as not being an enemy alien, as and though there were no state of war existing. The licence to trade must, I think, carry with it the right to sue for the purpose of protecting the trade which is licensed. How far that goes is a matter of some difficulty, but I think it goes at least to the stage of maintaining an action in these courts for the purpose of preventing some other person stealing his trade by passing off or otherwise damaging it by illegal means in the ordinary process of trade competition, and that it permits the action to prevent passing off and also to prevent infringement of a trade mark.

"I am of the opinion, therefore, that the plaintiff on the allegations in this statement of claim is entitled to maintain the action."

[Report: (1952) 52 State Reports, New South Wales, 16.]

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[1] [1915] 31 T.L.R. 407.

[2] (1799), 1 Ch. Rob. 196.

XIV.—Performance of Peace Treaties

War—Performance of Peace Treaties—Reparations—Restitution of Property—Whether Limited to Property Still Situate in Territory of State Bound by Obligation of Restitution—Obligation to Pay Compensation for Loss of Concessionary Rights—Measure of Damages—Destruction of Property Situated in Ceded Territory—Cash Seized on Sequestration—Whether Repayable in Full.

COLLAS & MICHEL CLAIM.

Franco-Italian Conciliation Commission. January 21, 1953.
(Bolla, Perier de Ferral, Sorrentino.)

THE FACTS.—In 1860 the firm of Collas & Michel, which comprised two French nationals and whose head office was in Paris, obtained from the Ottoman Imperial Government a concession for the construction and service of lighthouses along the coast of the Ottoman Empire, in the Mediterranean, in the Dardanelles and in the Black Sea. The concession was renewed from time to time and ultimately (in 1913) for a period expiring in 1949. Under Protocol XII annexed to the Treaty of Lausanne, 1923, the concession was kept in force with regard to the successor States of the Ottoman Empire and, in particular, Italy as exercising sovereignty over the Dodecanese. As regards the lighthouses of the Dodecanese, Italy took over completely the rights and obligations of the Ottoman Empire in relation to the firm of Collas & Michel.

By a Decree dated July 28, 1940, the Government of the Italian Islands of the Aegean Sea, seeing that the firm of Collas & Michel was composed of enemy nationals, placed it under sequestration. The Italian naval authorities were put in charge of the service of the lighthouses and the administration was handed over to the port authorities. During the war, eight of the nine lighthouses in the Dodecanese belonging to Collas & Michel were destroyed as the result of warlike action.

By Article 14 of the Treaty of Peace of 1947, Italy ceded to Greece in full sovereignty the Dodecanese Islands.

The French Government now claimed on behalf of Collas & Michel compensation under Article 78 (7)[1] of the Peace Treaty

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[1] Article 78, para. 7, provides:

"Notwithstanding the territorial transfers provided in the present Treaty, Italy shall continue to be responsible for loss or damage sustained during the war by property in ceded territory or in the Free Territory of Trieste belonging to United Nations nationals. The obligations contained in paragraphs 3, 4, 5 and 6 of this Article shall also rest on the Italian Government in regard to property in ceded territory and in the Free Territory of Trieste of United Nations nationals except in so far as this would conflict with the provisions of paragraph 14 of Annex X and paragraph 14 of Annex XIV of the present Treaty."

Paragraph 14 of Annex X relates to Trieste; para. 14 of Annex XIV provides:

"The property in ceded territory of any of the United Nations and its nationals, if not already freed from Italian measures of sequestration or control and returned to its owner, shall be returned in the condition in which it now exists."

(but did not claim restitution of their lighthouses, of which they had in fact recovered possession). For the Italian Government it was contended that under Article 78 (4) (*a*)[1] of the Treaty, it was bound to pay compensation only if it did not fulfil its obligation to restore in complete good order property of United Nations nationals. The duty to compensate was therefore dependent on that of restoring in complete good order and did not exist in a case where the Italian Government was no longer bound to restore in such order but was only bound to restore property in its existing condition, as is expressly provided in respect of property situated in ceded territory by para. 14 of Annex XIV, which was referred to by Article 78 (7) of the Treaty.

Held: that the claim must succeed. The obligation of the Italian Government to pay compensation was not limited by the fact that the claimants' property was in ceded territory. The Commission said:

" Article 78 (7) begins by laying down, in its first sentence, the principle that the responsibility placed by the Treaty of Peace on Italy for loss and damage sustained during the war by property belonging to United Nations nationals and situate in Italy on June 10, 1940, was not affected by the fact that the territory where the property was situate on that date had been transferred under the Treaty of Peace to come under another sovereignty. The second sentence of the paragraph states particularly the general principle laid down by the first sentence: in order to define the obligations of Italy and also to make it clear that property situated in ceded territory is in question, it refers expressly to paras. 3, 4, 5 and 6 of Article 78. Paragraphs 1 and 2 of that Article[1] are not mentioned, because Italy, having with the coming into force of the Treaty lost her sovereignty over the territory ceded, is no longer in a position herself to restore property which is situated in that territory.

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[1] Article 78, para. 4, provides:

" (*a*) The Italian Government shall be responsible for the restoration to complete good order of the property returned to United Nations nationals under paragraph 1 of this Article. In cases where property cannot be returned or where, as a result of the war, a United Nations national has suffered a loss by reason of injury or damage to property in Italy, he shall receive from the Italian Government compensation in lire to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered. In no event shall United Nations nationals receive less favourable treatment with respect to compensation than that accorded to Italian nationals."

" (*b*) United Nations nationals who hold, directly or indirectly, ownership interests in corporations or associations which are not United Nations nationals within the meaning of paragraph 9 (*a*) of this Article, but which have suffered a loss by reason of injury or damage to property in Italy, shall receive compensation in accordance with sub-paragraph (*a*) above. This compensation shall be calculated on the basis of the total loss or damage suffered by the corporation or association and shall bear the same proportion to such loss or damage as the beneficial interests of such nationals in the corporation or association bear to the total capital thereof.

" (*c*) Compensation shall be paid free of any levies, taxes or other charges. It shall be freely usable in Italy but shall be subject to the foreign exchange control regulations which may be in force in Italy from time to time.

" (*d*) The Italian Government shall grant United Nations nationals an indemnity in lire at the same rate as provided in sub-paragraph (*a*) above to compensate them for the loss or damage due to special measures applied to their property during the war, and which were not applicable to Italian property. This sub-paragraph does not apply to a loss of profit."

"Neither the first sentence of Article 78 (7) nor the reference in the second sentence to paragraph 4 of that Article would have any meaning if, as regards property situated in ceded territory, the obligation of Italy was limited to restoring that property in its existing condition. The first sentence of Article 78 (7) speaks of the responsibility of Italy for loss or damage, yet, according to the argument put forward on behalf of the Italian Government, no such responsibility exists. In the same way, the second sentence refers expressly to paragraph 4 of the same Article, which deals with the responsibility of Italy for loss and damage sustained by United Nations nationals to their property in Italy as a result of the war or of the 'special measures' applied to their property which are mentioned in paragraph 4 (*d*).

"It is true that the second sentence of Article 78 (7) sets a limit to the responsibility of Italy, defined by reference to paragraphs 3, 4, 5 and 6 of the Article. That limit results from the concluding words of the paragraph: 'except in so far as this would conflict with the provisions of paragraph 14 of Annex X and paragraph 14 of Annex XIV of the present Treaty'. Even for an interpreter who limits himself to a superficial examination of the text of these provisions, the only contradiction which exists is that between the obligation to restore property 'in the condition in which it now exists' (para. 14 of Annexes X and XIV) and the responsibility 'for the restoration to complete good order of the property restored to United Nations nationals' (Article 78 (4) (*a*), referred to by Article 78 (7)). On the other hand, there is no contradiction between the obligation to restore property 'in the condition in which it now exists ' and that of paying compensation for damage suffered by property as a result of the war or of a ' special measure '. The reason why Italy is exempt, so far as concerns property situate in ceded territory, from the responsibility for its ' restoration to complete good order ' is the physical impossibility for her of putting into operation the measures necessary to restore it to complete good order outside the territorial limits of her own sovereignty; no such impossibility exists as concerns the obligation to pay compensation for damage.

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[1] Article 78, paras. 1 and 2, provides:

"1. In so far as Italy has not already done so, Italy shall restore all legal rights and interests in Italy of the United Nations and their nationals as they existed on June 10, 1940, and shall return all property in Italy of the United Nations and their nationals as it now exists.

"2. The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. In cases where the property has not been returned within six months from the coming into force of the present Treaty, application shall be made to the Italian authorities not later than twelve months from the coming into force of the present Treaty, except in cases in which the claimant is able to show that he could not file his application within this period."

" But if the interpreter goes to the root of the matter, it will appear manifestly that the obligation imposed by paragraph 14 of Annex XIV (and also of Annex X) to return property ' in the condition in which it now is ' is imposed not on the Italian Government but on the Government of the successor State on whose territory the property happens to be. Thus the very basis on which rests the contention of the Italian Government disappears: as regards the property to which paragraph 14 of Annex XIV relates, not only has Italy no responsibility for its restoration to complete good order, but—as is logical—she is under no obligation at all to restore such property as happens to be outside the territorial limits of Italian sovereignty solely as the result of the coming into force of the Peace Treaty.

" Indeed, the Conciliation Commission shares the opinion of the Italian Government that paragraph 14 of Annex XIV, like all the other paragraphs of that Annex, governs the juridical relations of Italy with those of the United Nations who are in fact successor States and not the relations of the United Nations among themselves; the United Nations are, in the Treaty of Peace, one Party, the other Party being Italy. But that does not justify the arguments deduced therefrom on behalf of the Italian Government for the purpose of the present dispute. Paragraph 14 of Annex XIV imposes on the United Nations in the capacity of successor State an obligation towards Italy—that of freeing from sequestration or measures of control taken by Italy property of United Nations nationals situated on the territory of a successor State and of restoring it to its owners in the condition in which it was [at the coming into force of the Treaty]. To the extent of that obligation, Italy is relieved of its responsibility towards that one of the United Nations whose national is the owner of the property in question: if the successor State does not restore the property in the specified condition, Italy cannot be called upon to effect restitution or be ordered to put right damage resulting from default in restitution; but she can be proceeded against for compensation for damage or for the loss sustained by the property not restored as the result of war or by reason of special measures applied before the coming into force of the Peace Treaty. That, if the full scope of the Treaty is taken into account, is the only true meaning of the last sentence of Article 78 (7): the successor

State replaces Italy as regards the obligation to restore the property 'in the condition in which it now is', and Italy cannot be held responsible for the maintenance by the successor State, after the coming into force of the Peace Treaty, of a measure of sequestration or control taken by Italy against the property in question.

"It is not denied that the eight lighthouses the subject of the claim were destroyed as the result of the war. Consequently, Italy is obliged to pay compensation to the extent of two-thirds of the sum necessary to make good the loss suffered, as provided by paragraph 4 (*a*), read with paragraph 7, of Article 78 of the Peace Treaty.

"As regards the amount of the compensation, the French Government contends that it ought to comprise the cost of reconstructing the lighthouses, *plus* the value of their equipment and apparatus, now destroyed or disappeared. The Italian Government contends in reply to this argument that both the lighthouses and their equipment were largely, if not entirely, amortized by Collas & Michel and that in any event the latter would have lost all value for the firm on the expiry of the concession on September 4, 1949. To this it was objected on behalf of the French Government that the Italian Government is proceeded against not as an accounting party [*en tant qu'administration concédante*] but by virtue of the Treaty of Peace, which involves, in consequence, only the proprietary right of Collas & Michel in the lighthouses at the moment of coming into force of the Treaty. The Italian Government could at the most rely on the decayed state, due to the age of the installations. The Conciliation Commission bear in mind above all that internal amortization which the owner of property may have carried out as a measure of prudence, or even in the discharge of a legal obligation, does not lessen the value of the property in question as regards a third party who is bound to pay him compensation, either under municipal law or under an international obligation. On the other hand, the intrinsic value of installations constructed for the exploitation of a State concession cannot be determined by excluding consideration for the concession itself. The rule is that these installations are of value only to the extent that through them the right of concession of a public utility undertaking (for example, mines, hydraulic power, etc.) can be exploited (*mise en valeur*). In this instance, Article XVII of the original concession of 1860 reads as follows:

'On the expiration of the concession, the towers, lights, keepers' houses, boats, masts, machinery, accessories, etc., in fact all the equipment without exception in good state of repair and in accordance with the company's inventories, which shall be duly inspected in this regard, shall become the property of the Ottoman Government, without the concessionaires having the right to claim any compensation for this surrender.'

That clause was strengthened by Article VIII of the concession of 1879:

'Two years before the expiry of the term of the extended concession, the Government will appoint a commission charged with verifying the condition of the lighthouses. When this commission [is appointed] the concessionaires must give a sufficient guarantee for the payment of the whole of the necessary cost of putting the lighthouses into good order. Should this guarantee not be furnished, the Imperial Government shall have the right to seize the takings of the lighthouses during the rest of the term in order to ensure the execution of such repairs by itself.'

These two clauses were retained in their entirety both in successive renewals and on the conclusion of the agreement of 1927 between Collas & Michel and the Governor of the Italian islands of the Aegean Sea."

The Commission ordered payment by the Italian Government of financial compensation under the following heads:

(a) The sums of cash which were in the offices of Collas & Michel in the Dodecanese Islands at the time of the sequestration ordered by the Governor of the Italian islands of the Aegean Sea. On this point the Commission said: "The Italian Government must make complete restitution of the moneys which it sequestrated. As this was a seizure of specie, it cannot be claimed that it remained on ceded territory: the specie went to swell the coffers of the Italian Government, who had not nominated an administrator-sequestrator. In consequence, it is not paragraph 7 but paragraph 2 of Article 78 of the Peace Treaty that applies.[1] Exception may only be made for such of the moneys sequestrated as were allocated to the administration of the service and were credited in the administration accounts relating to the working of the property similarly sequestrated."

(b) The profits which Collas & Michel would have received from the lighthouse service during the war if the sequestration had not taken place. On this point the Commission said: "The Italian Government is equally indebted, and for the same reasons, in the amount of the profits which the service of the lighthouses would have earned for it from the date of the sequestration to that of the coming into force of the Peace Treaty. The Captaincy of the Port of Rhodes, an Italian public authority, was charged with the administrative service of the lighthouses. As regards the larger profits which

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[1] Article 78 (2) provides:

"The Italian Government undertakes that all property, rights and interests passing under this Article shall be restored free of all encumbrances and charges of any kind to which they may have become subject as a result of the war and without the imposition of any charges by the Italian Government in connection with their return. The Italian Government shall nullify all measures, including seizures, sequestration or control, taken by it against United Nations property between June 10, 1940, and the coming into force of the present Treaty. . . ."

Collas & Michel could have made during the same period but for the sequestration, the concessionary firm lost this contingent surplus not by reason of the sequestration (hence Article 78 (4) (*d*), referred to in Article 78 (7), of the Peace Treaty, does not apply), but by reason of the war, which reduced commercial traffic in the Aegean Sea and justified the introduction of new tariffs. Loss caused by the war, and not by warlike acts, is not made the subject of compensation under Article 78 (4) (*a*) of the Peace Treaty—so decided by this Commission in the *Pertusola Claim* on March 8, 1951,[1] and followed since."

[Report: *Recueil des Décisions*, Part 4, p. 134.]

NOTE.—On November 21, 1953, the Commission decided on the measure of damages applicable to this claim having regard to (a) the intentions of the Greek Government as to compelling the concessionaires to put the lighthouses in good order at the expiration of the concession; (b) the fact that shortly before the outbreak of war in 1949 the Italian Government had entered into negotiations with Collas & Michel to purchase their concession; and (c) the fact that during the war there would have been very little profit from the lighthouses seeing that commercial navigation was considerably hampered during the war. See *Recueil des Décisions*, Part 4, p. 277.

B—WARFARE ON LAND

II.—Appropriation, Utilization and Destruction of Enemy Property

Warfare on Land—Appropriation of Enemy Property—Booty—Modern Developments in International Law—*Postliminium*.

See p. 441 (*Gold Looted by Germany from Rome in* 1943).

War on Land—Enemy Property—Seizure of Unfinished Hulls in Shipyard—Whether Liable to Capture in Prize or Private Property on Land.

See p. 667 (*Schiffahrt-Treuhand and Others* v. *Her Majesty's Procurator-General*).

III.—Occupation of Enemy Territory

i.—Nature and Effects of the Occupation

Belligerent Occupation—Applicability of Local Law to Forces of Occupation.

BELGIAN STATE *v.* BOTTE.

Belgium, Court of Cassation. March 6, 1953.

THE FACTS.—On March 30, 1949, a collision occurred in occupied Germany between a German truck driven by the respondent, and a truck belonging to the Belgian forces of occupation. In a judgment of April 9, 1952, the Court of Appeal of Ghent ruled that German law was applicable to the accident; that that law had been infringed by the driver of the Belgian truck; and that the Belgian State thus bore the entire responsibility for the damage caused. An appeal was now brought on the ground, *inter alia*, that the application of German law to the collision was contrary to the sovereignty of the Belgian State.

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[1] See *International Law Reports*, 1951, Case No. 129.]

Held: that the appeal must be rejected.

The Court said: " In the case of occupation of foreign territory by an enemy, the authority responsible for that army must determine whether its members shall respect the rules existing in that territory concerning traffic on the public highway, or any special rules. The appellant does not invoke any provision made by the Belgian authorities laying down that members of the army of occupation should observe rules other than those enacted for the occupied territory by the local authorities."

[Report: *Pasicrisie belge*, 1953, I, p. 523.]

Belligerent Occupation—Effects of—Termination of Occupation—Continuance of Validity of Legislation Enacted by Government of Occupied State—Law Contrary to Constitution of Occupied State—Allied Occupation of Japan—Acceptance of Potsdam Declaration—Directives of Supreme Commander for Allied Powers.

Re The Validity of Cabinet Order No. 325 of 1950 (Sakagami Case).

Japan, Supreme Court (Grand Bench). July 22, 1953.

The Facts.—As one of the terms of her surrender in 1945, Japan undertook to issue whatever Orders were required by the Supreme Commander for the Allied Powers (hereinafter referred to as " S.C.A.P.") for the purpose of giving effect to the Potsdam Declaration. In accordance with this provision, the Japanese Government on September 20, 1945, promulgated Imperial Ordinance No. 542, which provided in effect that

" The Government may in case of special necessity stipulate for matters and by order enact necessary penal provisions for the purpose of giving effect to matters concerning the requirements of the Supreme Commander for the Allied Powers in consequence of the acceptance of the Potsdam Declaration."

Under this Ordinance, Cabinet Order No. 325 of 1950, entitled " Order for the Punishment of Acts Prejudicial to the Occupation Objectives ", was enacted. Such acts were defined in the Order as, *inter alia*, acts which violated directives issued by S.C.A.P. to the Japanese Government.

On April 28, 1952, the Treaty of Peace with Japan came into force, and the Allied occupation ceased. On the same day, Imperial Ordinance No. 542 of 1945 was repealed by Law No. 81 of 1952, which also provided that Orders issued under the Imperial Ordinanance should remain effective as law for 180 days unless before the expiry of that period other legislation provided for their abolition or continuance in force (as the case might be). In due course Cabinet Order No. 325 was repealed with effect from May 7, 1952, with a saving for the punishment of acts committed prior to that date. On the same day as the Treaty of Peace came into force, the accused was convicted under Cabinet Order No. 325 of 1950 of committing an act prejudicial to the occupation objectives, namely, publishing a periodical called " Heiwa no Koe " (" Voice of Peace ") contrary to directives issued by S.C.A.P. on June 26 and July 18, 1950, suspending a publication called " Akahata ", its successors and affiliates (the Court of first instance having found that " Heiwa no Koe " was a successor of " Akahata ").

The accused appealed against conviction on the grounds, *inter alia,* that the Imperial Ordinance and the Cabinet Order were invalid; that the directive of S.C.A.P. ordering the suspension of " Akahata " and its successors, etc., was contrary to Articles 19 and 21 of the Japanese Constitution (which guarantee fundamental human rights, in particular freedom of speech); and that the penalty imposed under the Cabinet Order had been abolished since the date of the conviction. On his appeal being dismissed, the accused appealed to the Supreme Court.

Held: that the appeal must succeed and the judgments of the Court of first instance and the High Court must be quashed. The accused had not been wrongly convicted, but the penalty had been abolished after his conviction. He must now be acquitted.

The opinion of Judges Mano, Kotani, Shima, Fujita, Tanimura and Irie was as follows:

" . . . Imperial Ordinance No. 542 of 1945 was enacted in implementation of the occupation administration by the Allied Powers in consequence of the unconditional surrender of our country. As it is generally known, our country had accepted the Potsdam Declaration, signed the Instrument of Surrender, and proclaimed unconditional surrender to the Allied Powers. In consequence thereof, the Supreme Commander for the Allied Powers acquired the authority to take such measures as he deemed proper to give effect to the terms of surrender, and to that extent the power of the Japanese Government to rule the country was made subject to the prerogatives of the Supreme Commander for the Allied Powers (Instrument of Surrender, para. 8). The Japanese people were commanded to comply with all requirements imposed by S.C.A.P. or by the agencies of the Japanese Government at the direction of the Supreme Commander (*idem*, para. 3). All civil officials were ordered to obey and enforce all proclamations, orders and directives deemed by S.C.A.P. to be proper for the effectuation of the surrender, and issued by him or under his authority (*idem*, para. 5). Our country has pledged itself to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever Orders and take whatever action may be required by S.C.A.P. or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration (*idem*, para. 6). Furthermore, Japanese civil officials and private citizens were commanded to obey scrupulously and promptly all instructions issued by S.C.A.P. or other Allied Military Authorities, and any delay or failure to comply with these instructions was to involve severe and immediate punishment at the hands of the Allied Military Authorities or the Japanese Government (para. 12 of General Order No. 1 attached to Directive No. 1). Therefore, it must be admitted that although, at the time when Japan was administered by the Allied Powers, the authority of the Japanese Government to rule the State was, generally speaking, exercised in accordance with the Constitution, the legal position of Japan was really that it had subjected itself to the authority of S.C.A.P. in so far as it was deemed by him to be proper to carry into effect the terms of surrender. That is to say, S.C.A.P. was given an entirely free hand to take any measures deemed by him to be proper, and, regardless of the provisions of the Constitution of Japan, to cause Japanese civil officials to obey and enforce any instruction issued by him for the purpose of effectuating the terms of surrender.

" Upon the basis of these fundamental relations, the above-mentioned Imperial Ordinance No. 542 was promulgated on September 20, 1945, soon after the signing of the Instrument of Surrender. This was an emergency Imperial Ordinance, which provided in effect that ' The Government may in case of special necessity stipulate for, and by order enact necessary penal provisions for the purpose of giving effect to, matters concerning the requirements of the Supreme Commander for the Allied Powers in consequence of the acceptance of the Potsdam Declaration '. In view of the fact that the Ordinance was based upon the aforesaid fundamental relations owing to the necessity of giving effect to the requirements of S.C.A.P., it must be admitted that the Ordinance had legal effect beyond the Constitution of Japan, and irrespective of the provisions of the Constitution. (See the judgment of the Grand Bench pronounced on April 8, 1953, in the *Re Case*, No. 685 of 1949.)

" Cabinet Order No. 325 of 1950, the ' Order for the Punishment of Acts Prejudicial to the Occupation Objectives ' (hereinafter referred to as Cabinet Order No. 325), which is here in issue, as well as its predecessor, Imperial Ordinance No. 311 of 1946 similarly entitled, was one of the ordinances enacted under the above-mentioned Imperial Ordinance No. 542 (hereinafter referred to as the Potsdam Ordinance) ' for the purpose of giving effect to matters concerning the requirements of S.C.A.P.'. Being similar to Imperial Ordinance No. 542, this Cabinet Order must be said to have legal effect beyond the Constitution at the time of its enactment. In so far as it is pertinent to the present case, Cabinet Order No. 325 is an Order which prescribes the punishment of a person who has committed ' an act prejudicial to the occupation objectives '. The substance of the ' acts prejudicial to the occupation objectives ' is not to be fixed by construction in accordance with a general standard, but is enumerated and defined in the very provision of the Cabinet Order as (1) acts committed in violation of directives to the Japanese Government issued by S.C.A.P., (2) acts committed in violation of any order issued by an Occupation Force Commander of an army, corps or division to implement such directives, and (3) acts committed in violation of laws and orders issued by the Japanese Government in implementation of these directives. According to the facts found by the High Court, the accused committed the act which was the subject of the charge against him, in violation of directives to the Japanese Government issued by S.C.A.P., thus committing an act prejudicial to the occupation objectives. Therefore, our present discussion regarding Cabinet Order No. 325 will be limited to this particular violation of the directives.

" The penal provisions of Cabinet Order No. 325 do not textually define the substance of the acts prohibited thereby, nor is such definition self-evident. The language of the Cabinet Order is abstract and formalistic in that it merely mentions ' acts which are in violation of directives to the Japanese Government issued by S.C.A.P.' It enables the substance of the prohibited acts to be deduced only indirectly and by reading the Cabinet Order in a wide context. In other words, the concrete and substantial elements of crime, which are necessary to make out an offence under Cabinet Order No. 325, can be spelled out and clarified only by a thorough preliminary search of the contents of the directives of S.C.A.P. Moreover, these penal provisions simply provide that acts which are in violation of directives issued by S.C.A.P. shall be punished. Its mandate is extremely broad in its scope, without any limitation as to what particular directives it envisages or what substantive acts it intends to cover. The penal provisions are extended categorically to cover all violations. That the directives issued by S.C.A.P. must be obeyed in good faith is, as already mentioned, expressly stated both in the Instrument of Surrender and in the General Order. There is no need to dwell on the fact that such scrupulous observance of directives should be regarded as the most essential prerequisite and the most important basis for the realisation of the intentions of S.C.A.P. to enhance his authority and to accomplish the occupation objectives under the condition called ' occupation '.

Therefore, it must be admitted that Cabinet Order No. 325 and its predecessor, Imperial Ordinance No. 311 of 1946, were enacted for no other purpose than to meet these requirements and to pave the way for their implementation. Since the very nature of these penal provisions was to enable S.C.A.P. to accomplish the occupation objectives, they should be regarded as having merit and significance only on the assumption that the state of occupation or the authority of S.C.A.P. continues to exist. In other words, these penal provisions must naturally lose their force and effect at the very moment that the occupation is terminated and the Supreme Commandership itself is dissolved.

" Meanwhile, the Treaty of Peace with Japan came into force on April 28, 1952; the state of war between Japan and each of the Allied Powers which signed and ratified the Peace Treaty has been terminated; peace has been restored; the occupation of the Allied Powers has been abolished; ' the full sovereignty of the Japanese people over Japan and its territorial waters ' has been recognized; and our country has once again recovered its status as an independent State. Thus the ' occupation ' ceased to exist after the Peace Treaty came into force. It is therefore only natural that there can be no longer any room for ' acts prejudicial to the occupation objectives ' to come into being. Nor is there any room for the ' directives of S.C.A.P.' to come into being, because ' S.C.A.P.' itself has been abolished. It therefore follows in the nature of things that there can be no room for the occurrence of ' acts which are in violation of directives issued by S.C.A.P.'. Accordingly, it must be admitted, as stated before, that Cabinet Order No. 325, which provided for the punishment of violations of directives, also lost its efficacy after the coming into force of the Peace Treaty, and the Order itself has accordingly become null and void.

" However, Law No. 81 of 1952, entitled ' Law concerning the Repeal of the Imperial Ordinance relating to the Orders to be Issued in Consequence of the Acceptance of the Potsdam Declaration ' (which came into force on April 28, 1952, the day of the coming into effect of the Peace Treaty), abolished Imperial Ordinance No. 542 of 1945. At the same time, however, it provided that Orders or Ordinances issued under Imperial Ordinance No. 542 should, unless measures for their abolition or continued existence were taken by special legislation, remain effective as law for not more than 180 days commencing from the date of the coming into force of this Law. Law No. 137 of 1952 entitled ' Law concerning Actions on Various Orders relating to the Attorney-General's Office under the Imperial Ordinance concerning Orders to be Issued in Consequence of the Acceptance of the Potsdam Declaration ' (which came into force on May 7, 1952) provided for the abolition of Cabinet Order No. 325, with the following saving: ' The application of the penal provisions to acts done prior to the enforcement of this Law shall still follow the former examples.' Generally speaking, the Potsdam Ordinances are to ' remain effective as laws ' in principle under Law No. 81 referred to above, even after the coming into force of the Peace Treaty. Consequently, it must be admitted that these Ordinances remain in force as law even after the coming into effect of the Peace Treaty, unless their contents are contrary to the provisions of the Constitution. However, the penal provisions of Cabinet Order No. 325 did not include a definition of the substantial elements of the crimes thereby created, as was done in the case of other Potsdam Ordinances in general. As already shown in detail, since they provide only for the punishment of violations of directives issued by S.C.A.P., they necessarily, by their very nature, lose their effect simultaneously with the coming into force of the Peace Treaty.

" To give Cabinet Order No. 325 the effect of a statute at the time when the Peace Treaty came into force, without giving similar force and effect to each one of the existing directives which carry out the intention of the Order, and to prescribe simply for the punishment of the violation of directives as a crime, is tantamount to stipulating matters which are practically impossible, thus eventually resulting in a contradiction of the provisions of the Constitution. Therefore, the enactment of Law No. 81 mentioned above does not prevent Cabinet Order No. 325 from losing its effect as a matter of course simultaneously with the coming into force of the Peace Treaty. (If the effect of the enactment of Law No. 81 were to give the force of law to the substance of each of the existing directives there would have arisen the necessity of determining the constitutionality of those directives, but, in fact, that Law merely gave the effect of law to Cabinet Order No. 325, that is, it merely made the act of violation of the directives a punishable offence as in the case of other Potsdam Ordinances in general. Since it was not the intention of the Law to give legal effect to each one of the directives, there is no need to examine each one of them to determine whether they are constitutional. As stated heretofore, the above-mentioned Law No. 81 is null and void and is unconstitutional so far as it purports to punish violation of directives regardless of whether the substance of the directives in question was in conformity with the Constitution.)

" Thus, Cabinet Order No. 325 had lost its effect on April 28, 1952, simultaneously with the coming into force of the Peace Treaty. Consequently, if it were the intention of the above-mentioned Law No. 137, which came into force on May 7, 1952, after the invalidation of the said Cabinet Order, to prescribe that acts done prior to invalidation should be punished as heretofore, that Law must be regarded as null and void inasmuch as it violates the purport of Article 39 of the Constitution. That is because the Law will become so-called *ex post facto* legislation in that it purports to revive the penal provisions of Cabinet Order No. 325 which had been invalidated.

" On the other hand, there are some who contend that even though the Cabinet Order No. 325 ceased to have effect simultaneously with the coming into force of the Peace Treaty, the Order was a temporary enactment in the nature of a statute of limitation, providing for a time limit to meet the special situation which existed under the occupation, and that it should therefore be applied, even after it has lost its effect, to cases occurring while the Order was in force. However, Cabinet Order No. 325 was, as stated before, enacted merely as a basis for the realization of the intentions of S.C.A.P. and for the implementation of his authority, thereby accomplishing the purpose of the occupation in the then existing special state of affairs. Accordingly, it must be said that the illegality and the penal nature of acts which were made illegal in occupied Japan by the said Cabinet Order have naturally vanished with the termination of the occupation. To say that acts in violation of directives issued by S.C.A.P. under the occupation should still be punished at the present day when the occupation is no longer in existence and Japan has regained her independence and when her Constitution has assumed a paramount position, would be tantamount to recognizing the continued existence of the power of S.C.A.P. and the effectiveness of his directives, and approving the continued existence of ' acts prejudicial to the occupation objectives '. Such a position is utterly incompatible with the Constitution. Therefore it is obvious that the view that penal provisions which have once become null and void because of their unconstitutionality, have, on the theory that the prescriptive period has been extended, been revalidated, is quite wrong.

" Now, with respect to the present case, the Court of Appeal having upheld the conviction of the accused under the penal provisions of Cabinet Order 325, which had lost its effect simultaneously with the coming into force of the Peace Treaty, it is proper that he be acquitted on the ground that it is a case in which the penalty has since the commission of the offence been abolished by law. The contention of defence Counsel on this issue must be sustained. If justice is to be done in this instance, the judgment of the High Court must be quashed on this issue without going into an analysis of other points raised by the defence in its statement of reasons for the appeal."

The concurring opinion of Judges Inoue, Kuriyama, Kawamura and Kobayashi was as follows:

" . . . The intendment of the directives of S.C.A.P. dated June 26 and July 18, 1950, was to prohibit the editing, printing, distributing, transporting, or the possession for the purpose of distributing, 'Akahata' and other publications designated by S.C.A.P.

as affiliates or successors of ' Akahata '. The accused was convicted under Article 1 and paragraph 1 of Article 2 of Cabinet Order No. 325 of 1950 on the ground that he had committed an act prejudicial to the occupation objectives in violation of the intent of those directives.

" Cabinet Order No. 325 of 1950 is one of the so-called Potsdam Ordinances enacted under Imperial Ordinance No. 542 of 1945, and it provided for the punishment of acts, etc., committed in violation of directives issued by S.C.A.P. As shown in an earlier case decided by this Court (see the judgment of the Grand Bench, pronounced on April 8, 1953, in the *Re Case,* No. 685 of 1949), the above-mentioned Imperial Ordinance No. 542 had a legal effect beyond the Constitution. Therefore, it must be admitted that the above-mentioned Cabinet Order No. 325 should also be regarded as valid to the fullest extent during the period of occupation, regardless of the fact that it contained some provisions which may be regarded as unconstitutional. However, once Japan has regained her independence as a result of the termination of the occupation, and the Constitution has come into full force, the existence of laws or ordinances contrary to the Constitution cannot be allowed to stand. Consequently, it is imperative that these orders and directives be subjected to close scrutiny to determine whether they may be permitted to remain in force as valid laws of the nation.

" Even though the occupation has been terminated and the position of Supreme Commander for the Allied Powers has been abolished, so that his directives, as well as our obligation to obey them, have ceased to exist, it does not necessarily follow that the Cabinet Order in question, after the Peace Treaty, completely lost its force and effect as a law of our country. The directives which constitute the substance of Cabinet Order No. 325 contained many elements which were designed not only for the benefit of the occupation forces but also for maintaining peace in our country and for the promotion of the public welfare. One cannot assert that Cabinet Order No. 325, embodying as it does the matters just described, is not entitled to become a law of our State simply because the directives were issued by S.C.A.P. Our country is at liberty to continue, even after the coming into force of the Peace Treaty, the validity of the said Cabinet Order as a law of the land in so far as concerns directives which contain elements compatible with the Constitution. Law No. 81 of 1952 provides that Orders or Ordinances issued under Imperial Ordinance No. 542 shall, unless measures for their abolition or continued existence are taken by special legislation, remain effective as laws for not more than 180 days, commencing on the day of the coming into force of the Peace Treaty. As a result, Cabinet Order No. 325, which is one of the Orders affected by Law No. 81, was also preserved to remain effective as a law, so far as its substance met with constitutional requirements.

" The penal provisions of the Cabinet Order in question do not in themselves clearly define or fix the essence of the crime thereby created; its definition is dependent upon directives which might be issued by S.C.A.P. from time to time as circumstances required. Therefore, so long as such uncertainty exists, it is open to question whether such provisions should be made a statute of the State. However, the directives already issued clearly became fixed on the coming into force of the Peace Treaty, and the vacuum in the said Order was filled, even though it was then something of an empty statute. Consequently, so long as the directives are constitutional, there should be no reason why they should be precluded from remaining effective as laws of our country.

" This leads to the consideration of whether the substance of the directives which the accused was found to have violated is in conformity with the Constitution . . ." After having answered that question in the negative, the Court concluded as follows: " Therefore, the judgments in first instance and on appeal should be quashed and the accused should be acquitted on the ground that the present case corresponds to a case in which the penalty has been abolished after judgment has been given. There is no need to go into the other issues raised in the statement of reasons for appeal."

[Report: Series of Prominent Judgments of the Supreme Court upon Questions of Constitutionality, No. 1 (1954).]

NOTE.—(1) While this case bears primarily upon the constitutional law of Japan, its close connection with belligerent occupation, as well as the relative inaccessibility of the report, would appear to justify its inclusion, with some omissions, in the present volume.

(2) Four of the fourteen Judges composing the Grand Bench appended elaborate supplementary or additional Opinions which, while of considerable constitutional interest, do not call for inclusion in this report.

Belligerent Occupation—Nature and Effects of—Municipal Law under Occupation—Applicability of Philippine Constitution During Japanese Occupation.

BAUTISTA *ET AL. v.* HILARIA UY ISABELO.

Philippines, Supreme Court. September 29, 1953.

THE FACTS.—On August 18, 1943, while the Philippines were under Japanese occupation, the plaintiff executed a deed conveying certain realty in Manila to the defendant, a Chinese national. This was an action to annul the deed on the grounds that the defendants were Chinese citizens and were therefore disqualified from purchasing real property, and that the sale had been induced through duress and misrepresentation. The Court of First Instance of Manila declared the conveyance void on the ground that

Chinese nationals were prohibited from acquiring real property in the Philippines by section 1 of Article III of the Philippine Constitution, as it existed prior to the occupation, but failed to find that the plaintiff was the owner of improvements which had been built on the property and to require the defendant to account for the rent previously collected. Both parties appealed.

Held: that the decision of the Court below must be reversed and the plaintiff's petition dismissed. The Philippine Constitution was not in force during the Japanese occupation.

The Court said: " . . . the alleged misrepresentation could not have been decisive in the execution of the deed of sale, the material and important factor undoubtedly being the adequacy of the price offered and paid; and there is no controversy on the latter point.

" This leads us to the question whether the defendant spouses, assuming that they were Chinese citizens and that the sale was made to both and not solely to Hilaria Uy Isabelo, are disqualified to acquire and hold the property in question in view of section 1 of Article III of the Constitution, as construed in *Krivenko* vs. *Register of Deeds of Manila*, 44 Off. Gaz., 471. In the case of *Trinidad Gonzaga de Cabauatan et al.* vs. *Uy Hoo et al.*, G. R. No. L–2207, decided on January 23, 1951, we already held that the Constitution was not in force during the Japanese military occupation and therefore the constitutional provision disqualifying aliens from acquiring real properties in the Philippines was not applicable and the doctrine laid down in the *Krivenko* case cannot be invoked in a sale that took place during said occupation. This decision was followed in the later case of *Ricamara et al.*, vs. *Ngo Ki alias Sia Sim*, G. R. No. L–5836, decided on April 29, 1953. It results that the sale in question has to be sustained.

" Moreover, as also intimated in our decision in *Gonzaga de Cabauatan* vs. *Uy Hoo et al.*, even assuming that the constitutional prohibition and the doctrine in the *Krivenko* case may be invoked by the herein plaintiffs, as both parties were in *pari delicto*, knowing that what they did was in violation of the Constitution, the law will maintain them in their actual situation, in the absence of any statute to the contrary. Another consideration in favor of the defendant Hilaria is that, after the death of her Chinese husband on April 3, 1948, she had admittedly been repatriated and is now beyond question a Filipino citizen."

(One Judge concurred separately, and one Judge dissented on the ground that the acquisition of realty by foreigners had also been prohibited during the occupation by the regulations of the Occupying Power.)

[Report: Off. Gaz. 49 (1953), 4336.]

NOTE.—*Cf. Rellosa* v. *Gaw Chee Hun* (*infra*, p. 645).

Belligerent Occupation—Nature and Effects of—Constitution Adopted under Occupation—Effect of Philippine Constitution Adopted During Japanese Occupation.

RELLOSA *v.* GAW CHEE HUN.

Philippines, Supreme Court. September 29, 1953.

THE FACTS.—On February 2, 1944, the plaintiff conveyed certain realty in Manila to the defendant, a Chinese national. The plaintiff brought this action seeking annulment of the conveyance on the ground that a condition of the sale was that the defendant would obtain the approval of the Japanese Military Administration in accordance with Seirei No. 6 and that such approval had not been obtained. Seirei No. 6 prohibited aliens from acquiring certain categories of land without special permission. In addition, the plaintiff alleged that the sale would in any event be void under section 5 of Article VIII of the Philippine Constitution, which prohibited the transfer of land except to persons qualified to acquire and hold lands of the public domain of the Philippines. The Court below dismissed the plaintiff's petition, and he appealed. The Court of Appeals having affirmed the dismissal of the petition, the plaintiff appealed further. He contended, *inter alia*, that Seirei No. 6 violated Article 43 of the Hague Regulations.

Held: that the decision of the Court of Appeals must be affirmed. The sale was rendered invalid by the provisions of the Constitution, which was in force at the time of the sale. However, because the parties were *in pari delictu*, the conveyance would not be nullified, and no affirmative relief would be granted.

The Court said: " We do not believe it necessary to consider now the question relative to the validity of Seirei No. 6 of the Japanese Military Administration for the simple reason that in our opinion the law that should govern the particular transaction is not the above directive, but the Constitution adopted by the then Republic of the Philippines on September 4,1943, it appearing that the aforesaid transaction was executed on February 2, 1944. Said Constitution, in its Article VIII, section 5, provides that ' no private agricultural land shall be transferred or assigned except to individuals, corporations, or associations qualified to acquire or hold lands of the public domain in the Philippines ', which provisions are similar to those contained in our present Constitution. As to whether the phrase ' private agricultural land ' employed in said Constitution includes residential lands, as the one involved herein, there can be no doubt because said phrase has already been interpreted in the affirmative sense by this Court in the recent case of *Krivenko* vs. *Register of Deeds*, 42 Off. Gaz., 471, wherein this Court held that ' under the Constitution aliens may not acquire private or public agricultural lands, including residential lands.' This matter has been once more submitted to the court for deliberation, but the ruling was reaffirmed. This ruling fully disposes of the question touching on the validity of the sale of the property herein involved.

"The sale in question having been entered into in violation of the Constitution, the next question to be determined is, can petitioner have the sale declared null and void and recover the property considering the effect of the law governing rescission of contracts? Our answer must of necessity be in the negative. . . ."

(Two Judges filed dissenting opinions.)

[Report: Off. Gaz., 49 (1953), 4345.]

NOTE.—The Philippine Constitution referred to in this case is that adopted on September 4, 1943, incident to the purported grant of independence to the Philippines by the Japanese Military Administration. See Jones, Borton and Pearn, "The Far East 1942–1946", in Royal Institute of International Affairs, *Survey of International Affairs*, at pp. 46–48. This Constitution is to be distinguished from the Constitution of 1935 in issue in *Bautista et Al.* v. *Hilaria Uy Isabelo* (*supra*, p. 643).

ii.—Legislative, Judicial and Administrative Functions of the Occupant.

Belligerent Occupation—Administrative Functions of Occupant—Limits of—Contracts Entered into by Occupant—Article 43 of the Hague Regulations.

STATE OF THE NETHERLANDS *v.* JESSEN.

Holland, Court of Appeal of The Hague. January 24, 1953.

THE FACTS.—In 1943 a contract for the lease of a house of which the defendant was the owner had been concluded between the Netherlands Public Buildings Office, a government office, and the defendant. A clause in this contract stipulated that the Public Buildings Office could use the house for a branch of the German civil administration. Until December 1, 1944, the Reichskommissar for the occupied Netherlands territories housed there a department of his civil administration. The present action hinged on the question whether this contract could be based directly on the obligation of the Occupying Power to restore or maintain public order and public life in the Netherlands.[1] The State of the Netherlands pleaded that it could not be bound by a contract made during the occupation between the Head of the Public Buildings Office and the defendant. In this contract the Head of the Public Buildings Office had stated to be acting for the State. The State denied that this could be so, because, it maintained, the contract could not be based on any duty of the Occupant as recognized by public international law and as established in Article 43 of the Hague Rules on Land Warfare. The State maintained that, by virtue of the Hague Rules, the Occupant is only authorized to exercise military power and to establish a military administration. The Occupant further had the obligation only to wield such power subject to respecting the law of the land. The fact that a German civil administration was established can therefore not be considered as being a consequence of the Occupant's duty to restore and maintain public life in the country during the time it was occupied.

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[1] This form of words is taken from Article 1 of the Act of October 13, 1950 (*Staatsblad*, No. K 451), defining the criteria according to which the State and other public law corporations are bound by contracts entered into by the Occupant in occupied Dutch territory. *Cf.*, as to this Act, *Zeeuwsche Hypotheekbank Ltd.* v. *State of the Netherlands* (*Annual Digest*, 1948, Case No. 188 and Note I thereto). See also "*ANIEM*" v. *State of the Netherlands* (*ibid.*, 1949, Case No. 163 and Note).

Held: that this lease, which served the interests of the German administration, could not be held to have arisen directly from the obligation of the Occupying Power to maintain public order and public life in the occupied Netherlands, and that the State of the Netherlands could not be regarded as being bound by the contract.

The Court said: "The contention of the State is that the establishing of a civil administration in occupied territory is in itself contrary to the Occupying Power's obligations based on the Hague Rules on Land Warfare, because these Rules merely provide for military administration. This is incorrect.[1] Although the Rules only envisage the exercising of military power over occupied territory, this does not mean that, for this reason alone, all enemy civil administration in occupied territory must be qualified as *ipso jure* unlawful. It is even conceivable that, in the case of an occupation of long duration, a civil administration that functions properly will better meet the interests of the population than a military administration. An Occupying Power does not, however, derive from the setting up of a civil administration the right—save in case of absolute military necessity—to disregard the laws of the occupied territory. It is, therefore, necessary to examine the regularity of the acts of the German civil administration established by Hitler in the occupied Netherlands. Even a summary examination already demonstrates that this administration, far from promoting the interests of the Netherlands population, from the very beginning was intended to render the Netherlands politically and economically completely subordinate to German interests and to subjugate the territory to the needs of German warfare, in complete denial of Germany's international obligations."

[Report: *N.J.*, 1955, No. 35.]

[1] The controversy on the admissibility or otherwise of the Occupying Power's establishing a civil administration independent of the highest military commander in occupied territory has never been resolved. The general trend of the judgments of the Special Criminal Courts has been against such admissibility: *cf. Van Creveld* v. *Onderlinge Oorlog Schadeverzekering-Maatschappij* (*Annual Digest*, 1947, Case No. 109). See also *In re Rauter* (*ibid.*, 1949, Case No. 193, especially at p. 540). There were, however, findings by the ordinary Courts in the opposite sense: *cf. K.N.A.Ç.* v. *State of the Netherlands* (*ibid.*, Case No. 168, and Note).

Belligerent Occupation—Powers and Functions of the Occupant—Judicial Functions—Divorce Pronounced by German Court in Annexed Belgian Territory—Validity of.

MOMMER AND OTHERS *v.* RENERKEN.

Belgium, Court of Cassation. December 11, 1953.

THE FACTS.—On April 7, 1941, the Court of Aix-la-Chapelle dissolved the marriage of the respondent and his wife, *née* Mommer. After the divorce, the property of the spouses was divided. The wife died on May 13, 1949, having bequeathed her share of the property to the appellants. The respondent thereupon sought to obtain a declaration that the divorce, and accordingly the division of property consequent thereon, had been null and void, that the marriage had subsisted until the death of the wife, and that the clause in the marriage contract transferring the entire property to the surviving spouse took effect at that moment. On April 9, 1952, the Court of Appeal of Liége found in his favour. It did so on the ground that the Court of Aix-la-Chapelle had had jurisdiction in the case only as a result of the purported annexation of the Eastern territory of Belgium by Germany and that the Decree-Law issued in London on May 5, 1944, proclaimed the nullity of " all decrees, orders, instructions, opinions, decisions, appointments and acts of any kind whatsoever, to the extent that they are based on the *de facto* modifications of the limits of the national territory made by the enemy ". It was now contended on behalf of the appellants that the Law of May 5, 1944, was not intended to apply to acts necessary to the normal continuance of civil life, that the divorce pronounced by the German court was amply justified, that the judgment stated expressly that it would have been so justified in Belgian law, and that the dissolution of the marriage was accordingly valid.

Held: that the decision of the Court of Appeal must be quashed.

The Court said: " The Law of July 27, 1953, determining the effects of the application of German law in the parts of Belgian territory wrongfully annexed by Germany in May 1940, provides in Article 8 that ' a new marriage contracted by one of the spouses before the liberation of the territory, or the death of one of the spouses before the entry into force of this law, will validate judgments or decrees of divorce, separation or annulment of marriage '. Article 15 of the Law makes Article 8 applicable to pending actions. Mrs. Renerken, *née* Mommer, died on May 13, 1949. Accordingly, the judgment of the Court of Aix-la-Chapelle of April 7, 1941, is validated by the application of Article 8 of that Law."

[Report: *Pasicrisie belge*, 1954, I, p. 296.]

Belligerent Occupation—Judicial Acts of Occupant—Tribunals of Occupant—Whether Foreign or Municipal Tribunals—Conviction by Tribunal of Occupant—Whether Justifying Dismissal of National of Occupied Country from the Public Service—The Law of Austria.

Police Inspector G. *v.* Innsbruck Police Inspectorate.

Austria, Administrative Court. February 27, 1953.

The Facts.—The Austrian Disciplinary Code provides for the dismissal from the public service of persons who have been convicted of a " crime " within the meaning of the Austrian Penal Code. The appellant, an Austrian police inspector, was convicted by a French military tribunal for stealing hay, the property of the French army of occupation, his conviction being based on the relevant provisions of the French Penal Code and the French Military Penal Code. The defendants (respondents herein) thereupon dismissed him from the public service, on the ground that he had been convicted of a crime within the meaning of the Austrian Penal Code. The appellant now appealed against his dismissal, his contention being that his conviction by a French military tribunal was not a conviction by an Austrian court and did not therefore justify his dismissal. The respondents contended that a conviction by a military tribunal of the Occupant must be treated as if it were a conviction by an Austrian court, and that the appellant's dismissal was therefore justified.

Held: that the French military tribunal had not acted in the exercise of Austrian jurisdiction, and that the appellant's dismissal must accordingly be declared invalid.

The Court said: " The appellant was convicted by a French military tribunal on May 6, 1949, for having ' fraudulently ' stolen sixteen bales of hay, to the detriment of the French army and contrary to Articles 379, 401 and 463 of the *Code Pénal* and Article 164 of the *Code de Justice Militaire.* He was sentenced to four months' imprisonment. The Police Inspectorate of Innsbruck thereupon ordered his dismissal in accordance with section 116 of the (Austrian) Disciplinary Code. The reason given for the dismissal was that convictions by Allied military tribunals in Austria must be treated, in so far as concerns their legal effect, like convictions by Austrian courts, and that the conviction before the French military tribunal had been obtained for an offence which is a crime according to Austrian law and as such leads to the loss of public office, as provided in section 26 of the Penal Code. Section 116 of the Disciplinary Code provides that a civil servant may be dismissed by administrative action, without prior proceedings, if a criminal court has pronounced a conviction against him which, in accordance with the existing legal provisions, leads to the immediate loss of office. The respondents therefore had to ascertain whether the legal consequences provided for in section 26 of the Penal Code followed *ex lege* upon a conviction by a French military tribunal. This Court cannot accept the view of the respondents that the judgment of the French military tribunal must be treated like the judgment of an Austrian Court and must therefore result in the immediate loss of office in accordance with section 26 of the Penal Code. The French tribunal judged the offence in accordance with the *Code Pénal* and the *Code de Justice Militaire*. By applying French criminal law it has shown that it was not administering justice in the exercise of Austrian jurisdiction. The judgment cannot therefore be regarded as a judgment within the meaning of Austrian law, such as would result in loss of office. The application of the provisions contained in section 116 of the Disciplinary Code is therefore not in accordance with the law. The decision of the respondents must accordingly be declared invalid."

[Report: VwGH(A), 8 (1953), p. 184.]

Belligerent Occupation—Legislative Acts of Occupant—Criminal Offences Constituting Violations of Law of Occupant as well as of Municipal Law—Trial of Offender by Municipal Court—Whether Municipal Court to Apply Law of Occupant or Municipal Law.

OFFENCES AGAINST LAW OF OCCUPANT CASE.

German Federal Republic, Federal Supreme Court.
May 21, 1953.

THE FACTS.—A Law enacted by the Occupying Powers in Germany provided for the punishment of certain offences, such as larceny and receiving, committed in respect of property belonging to the Occupying Powers. The German Penal Code provided for the punishment of similar offences when committed quite generally in respect of the property of another person. A German Court, to which the trial of the appellants had been referred, found them guilty of stealing Allied property, and in so doing applied the Law enacted by the Occupying Powers, and not German law.

Held: that where a German court is concerned with the trial of an offence which constitutes a violation of German criminal law, it must apply that law, and none other, notwithstanding that the offence may also constitute a violation of a Law enacted by the Occupant. Accordingly, the appeal of the Public Prosecutor must be allowed to the extent that it was based on the application of German law, though not in so far as it was based on the concurrent application of the Law of the Occupant.

The Court said: "As between German courts and the courts of the Occupying Powers, we must apply the general rule that each criminal court adjudicates in accordance with its own substantive criminal law. The criminal law of the Occupying Powers is not German criminal law. It is a special law, concerned with the occupation and created for the purpose of being applied by the occupation courts. This may be inferred from the fact that in principle the trial of offences against that law is removed from the competence of the German courts. Those German courts which have been empowered to exercise jurisdiction over offences against Allied interests in individual cases exercise that jurisdiction, not in the name or on behalf of the Occupying Powers, but in their own right and as original German jurisdiction, the exercise of which is only temporarily restricted and revives in accordance with the power which may be conferred in individual cases. It follows that where there is a concurrence of Allied and German criminal law, German courts must apply only German law. . . . The Court below should therefore have applied only German law."

[Report: NJW, 6 (1953), p. 1520.]

Belligerent Occupation—Legislative Acts of Occupant—Whether such Acts Constitute Foreign or Municipal Law—Competence of Municipal Courts to Apply Legislative Acts of Occupant—Right of Appellate Jurisdiction of Municipal Courts—" De-Nazification " in Germany.

DE-NAZIFICATION CASE.

German Federal Republic, Federal Administrative Court.
November 20, 1953.

THE FACTS.—After the end of the Second World War the Occupying Powers enacted certain legislation in occupied Germany which provided for the so-called " de-nazification " of German nationals, more particularly defined in various Military Government Ordinances. It was further provided that German courts were to exercise jurisdiction in de-nazification proceedings. The appellant alleged that a German court exercising such jurisdiction had arrived at a decision adverse to her, by reason of the erroneous application of the relevant provisions of the De-Nazification Law, and that she was entitled to appeal against that decision to the Federal Administrative Court. The relevant section of the Law governing the appellate jurisdiction of the Federal Administrative Court provided that the latter was competent to hear and determine appeals based on the " non-application or erroneous application of Federal law ". Relying on this provision, the appellant contended that the De-Nazification Ordinances enacted by the Occupying Powers were " Federal law ", and that the Federal Administrative Court was accordingly bound to hear her appeal.

Held: that the De-Nazification Ordinances enacted by the Occupying Powers were not " Federal law " and that, accordingly, the Federal Administrative Court was not competent to exercise appellate jurisdiction in de-nazification proceedings.

The Court said: " Federal law is the law enacted by the legislative organs of the Federal Republic (Federal constitutional law, Federal statutes and ordinances, and Federal customary law), as well as the law provided for in Articles 124 and 125 of the Federal Constitution and dating from a time prior to the assembly of the first Federal Parliament.[1] It is beyond doubt that occupation law is not Federal law by origin; nor could legislation enacted by the Occupying Powers be transformed into Federal law by virtue of Articles 124 and 125 of the Constitution. It is true that these Articles refer quite simply to ' law ', a use of terminology which might mislead us into thinking that a law enacted by the Occupying Powers, in so far as it relates to matters within the exclusive or concurrent legislative competence, might be covered by those Articles. Such an assumption, however, would be erroneous. Articles 124 and 125 can apply only to legislation which, by virtue of the transformation provided for in the said Articles, is capable of acquiring the legal status of Federal law. This, however, is impossible in the case of a law enacted by the Occupying Powers because such a law, as distinct from a Federal law, cannot simply be amended or repealed by the legislative organs of the Federation. It continues to apply, again as distinct from a Federal law, even if it contravenes the Constitution, and, unlike Federal legislation, it is not subject to the control of German courts, including the Federal Constitutional Court . . ."

[Report: JZ, 9 (1954), p. 393.][2]

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[1] Article 124 of the Constitution provides as follows:

" Law relating to matters within the exclusive legislative competence of the Federation (Bund) becomes Federal law within the territory to which it applies." Article 125 provides:

" Law relating to matters within the concurrent legislative competence of the Federation becomes Federal law within the territory to which it applies, (1) in so far as it is uniform law within one or more zones of occupation, and (2) in so far as it concerns law which after May 8, 1945, amended former Reich law."

[2] This decision may be contrasted with a judgment of the same Court, given on February 16, 1954, in which it held that in proceedings arising out of matters within the concurrent legislative competence of the " Länder ", the Federal Administrative Court is entitled to exercise appellate jurisdiction, notwithstanding that such matters are governed by a Law of the Occupying Powers: JZ, 9 (1954), p. 394. The distinction between the two cases would appear to be that, while in the case referred to in this footnote the subject-matter (legislation relating to certain questions of the law of landlord and tenant) was within the concurrent competence of the " Bund " and the " Länder ", in the case reported above the subject-matter (de-nazification) was within the exclusive competence of the " Länder ".

Belligerent Occupation—Judicial Powers of Occupant—*Postliminium*—Effect of Orders of Courts of Occupant—Jurisdiction of Courts of Territorial Sovereign to Set Aside Such Orders.

CHETTIAR *v.* KHENG.

Federation of Malaya, High Court of Kuala Lumpur.
(Wilson J.)
February 11, 1953.

THE FACTS.—The plaintiffs, as the attorneys of Valliammai Achi and Meenatchi Achi, the widows of one Sethuramaswamy Chettiar, were administrators in the Federation of Malaya of the estate of Sethuramaswamy Chettiar, who died in India on February 2, 1941, having appointed his father, Raman Chettiar, as his executor. By an Order made by the Supreme Court of the Federated Malay States at Ipoh, on June 30, 1941, it was ordered that letters of administration be granted to Letchumanan Chettiar as attorney of Raman Chettiar. The letters of administration, with the Will annexed, were issued to Letchumanan Chettiar on June 2, 1944, and on October 10, 1944, pursuant to an Order made by the Japanese High Court at Kuala Lumpur, the said letters of administration were re-sealed by the Japanese High Court of Selangor. Raman Chettiar died in India on November 28, 1945, and thereupon the letters of administration with the Will annexed granted to Letchumanan Chettiar ceased to be of any force or effect.

In the meantime, by an agreement in writing dated June 1, 1945, made between Letchumanan Chettiar and the defendant, the former agreed to sell certain lands in Selangor to the defendant at the price of 33,000 dollars paid by the defendant in occupation currency, subject to Letchumanan Chettiar obtaining the approval of the Japanese Governor of Selangor for the purchase of the said lands. Letchumanan Chettiar applied for and obtained leave to sell from the Japanese High Court at Kuala Lumpur, and an order to this effect was made by the Court on July 17, 1945. On July 25, an application to the Japanese Governor was made by the defendant, for permission to purchase the lands, but permission was not obtained before the Japanese surrendered shortly afterwards.

The plaintiffs claimed that the agreement of June 1, 1945, was null and void.

Held: (1) that the Court had no inherent jurisdiction to set aside orders of the Courts of the occupying Power; (2) that although the order of the Japanese Court did not apply specifically to the sale of the lands to the defendant, it was nevertheless sufficient to render the sale (which in fact occurred subsequently) valid; and (3) that the fact that the Japanese Governor was unable to give his consent did not invalidate the sale and could not now be relied on to do this. According to the law of Malaya, the courts of an occupied country possessed no inherent jurisdiction to set aside the judgments of courts set up by the Occupant during a period of belligerent occupation.

The Court said: "... I agree with the views expressed by Spenser Wilkinson J. in *Yeap Lean Seng and Four Others* v. *Kok Ho Teik and Another* [(1951) 17 M.L.J. 235] that this Court has no inherent jurisdiction to set aside Orders of the Courts of the occupying Power. I agree with him that there must be some statutory provision to enable this Court to do so, and undoubtedly it was for this purpose, *inter alia*, that Ordinance No. 29 of 1946 was passed. I think it is clear on the authority of *Craig* v. *Kanssen* ([1943] K.B. 256) that an Order which can properly be described as a nullity must be set aside in some form or other before it ceases to be effective. I am of opinion that this Court has no power in this suit to set aside the Japanese Order. The Japanese Order was, in fact, made, and I find that it cannot now be deemed by this Court to be ineffective. ..."

[Report: (1951) II M.L.R. 154.]

Belligerent Occupation—Legislative Powers of Occupant—Legislation Concerning Marriage—Validity of.

LITSENBURG *v.* ROGOWSKA.

Holland, District Court of The Hague. June 30, 1953.

THE FACTS.—This was an action for a divorce. The parties had on March 11, 1944, contracted a marriage at Cracow, in Poland (formerly Austrian territory), before a Roman Catholic priest, in accordance with Austrian law as it had remained in force after 1919. This law was said to have been abrogated in 1939 by the German Occupation Authorities. The plaintiff, who was a Netherlands national, contended that, the marriage having been celebrated in violation of the law enacted by the Occupying Power, it was invalid.

Held: that the German legislation must be disregarded, and that the marriage had therefore been validly contracted. The Court, before considering the request for a divorce, examined whether this marriage was valid as to form according to the law of the country where it had been contracted, as required by Article 5 of the Hague Convention of 1902 on conflicts of law concerning marriage. That Convention was in force between the Netherlands and Poland in 1944.

The Court said: "When Polish independence was established in 1919 in the former Austrian territory of Galicia in which Cracow is situated, legislation as to celebration of marriages was maintained as it had existed in Galicia when that territory was under Austrian sovereignty. Under that legislation, dating from 1811, a marriage contracted between Roman Catholics before a Roman Catholic priest was regarded as valid under the civil law. It is irrelevant to examine whether during the German occupation of Poland the Occupying Power had *de facto* or *de jure* set aside this Polish law. Any treaty obligation of the Netherlands *vis-à-vis* Poland to take into account German occupation legislation would depend on whether Poland after her liberation had confirmed such legislation and incorporated it into her own law. This Poland certainly had not done. The Netherlands courts must therefore regard the marriage in question as valid."

[Report: *N.J.*, 1954, No. 272.]

Belligerent Occupation—Legislative Measures of the Occupant—Nationality.

See p. 57 (*Lesser* v. *Rotterdamsche Bank and Kling and Others*).

Belligerent Occupation—Legislative Functions of Occupant—Illegal Enactments of Occupant—Effect of Inter-Allied Declaration of 1943 relating to Unlawful Dispossession by German Occupation Authorities—Belgian Decree-Law of 1944—Enforceability before Dutch Courts.

See p. 26 (*Kingdom of Belgium* v. *E.M.J.C.H.*).

Belligerent Occupation—Legislative Functions of Occupant—Illegal Enactments of Occupant—Effect of Inter-Allied Declaration of 1943 relating to Unlawful Dispossession by German Occupation Authorities—Belgian Decree-Law of 1944—Enforceability before Dutch Courts.

See p. 28 (*Kingdom of Belgium* v. *Albrecht and Willem Wannijn*).

iii.—Respect for Private Property. The Public Property of the Enemy State. Requisitions and Contributions

Belligerent Occupation—Respect for Private Property—Property Seized Unlawfully — Treaties — Character of — Declaration of London, 1943—Procedure for Execution of Declaration—Concurrent Civil Law Procedures—Recognition of Foreign Legislative Acts—Legislative Acts which are Political in Character.

DE ROTHSCHILD *v.* TEUSCHER AND SOCIÉTÉ D'ENCOURAGEMENT POUR L'AMÉLIORIATION DES RACES DE CHEVAUX EN FRANCE.

Belgium, Tribunal Civil of Brussels. May 21, 1953.

THE FACTS.—Before the Second World War the plaintiff, a French national, owned a number of race horses, including a stud mare named Eastern Belle. During the German occupation of France his horses were taken by the French authorities (the Vichy

Government) and sold to a German authority. The mare Eastern Belle was transported to Germany, where she was resold under the name of Erlkönigin. In 1947, the mare gave birth to a filly, Erlenkind, the sire being a German stallion. In 1948 the filly was sold to the defendant. Some time later the American occupation authorities in Germany granted a claim for restitution of the mare, but rejected a similar claim for the filly. In 1952, the filly was sent to Belgium to run in some races there. The plaintiff issued a writ of attachment and sought to obtain the ownership of the filly on the ground that it was an accretion to his property which had been unlawfully seized during the German occupation of France, and had since been restored to him. On behalf of the defendant Teuscher, it was contended that the Court was not competent to hear the case seeing that the competent authority, namely, the American occupation authorities in Germany, had already rejected a claim for restitution of the filly. It was further contended on behalf of the defendant that he had acquired a valid title to the filly.

Held: that the action must be dismissed. The Court was competent to hear the case, its normal procedure being concurrent with the special procedures set up by the occupation authorities in Germany. Under the law governing the transaction, namely, German civil law, the defendant had acquired a valid title by purchase in good faith.

The Court said: " On the plane of international law the defendant contests (1) the competence of this Court *ratione materiae*, (2) the receivability of the action, and (3) the claim that the action is well founded.

" 1. With regard to the competence of this Court *ratione materiae* (a) Legislation: On January,5 1943, the Governments signatories of the Declaration of London, together with the French National Committee, solemnly warned the world that they reserved the right to declare invalid any transfers of, or dealings with, property, rights and interests of any description whatsoever which were or had been situated in the territories which had come under the occupation or control of the enemy. In application of that Declaration, the Allied occupation authorities blocked all goods situated in Germany which had been forcibly or fraudently seized or confiscated, or taken during the pillage of territory outside Germany, even if such goods were seized in pursuance of an enactment or as a result of a transaction apparently legal in form (Law No. 52 on the Blocking and Control of Goods, of September 1, 1945, Article 1). In particular, all contracts of transfer made prior or subsequent to that Law with a view to evading the restitution of goods to their true owners were declared invalid (Article V).

" Having taken these measures of conservation, the Allied occupation authorities required all such goods to be declared by those in whose possession or under whose control or administration they were, or who had knowledge of their existence. Such declarations were required to be made in the various zones of occupation. In the American Zone the time limit for such declarations expired on June 1, 1946.

" Arrangements were then made for the restitution of goods seized in occupied territory and blocked in Germany. A Directive of the Control Council dated January 20, 1946, defined restitution, limited it to certain categories of goods, and laid down the procedure to be followed in the matter. The right to restitution of goods taken away by the Germans from the territory of any of the United Nations was to be examined in the light of the Declaration of London of January 5, 1943, *i.e.*, it related to goods of any description whatsoever which had been situated in occupied territory and had been the object of a transfer, whatever its form. Three categories of goods were made eligible for restitution: first, identifiable goods in existence at the time of the occupation and seized by the enemy; secondly, identifiable goods produced during the occupation and taken by the enemy by force; and, finally, all other goods within the limits compatible with reparations. All questions of restitution would be settled by the Control Council and the Government of the country whence the seized goods came.

" According to the interpretation given in the Directive of the Control Council, the right to the restitution of identifiable goods in existence, or produced at the time of or during the occupation, is absolute. Other goods are liable to restitution only within the limits compatible with reparations.

" The zone Commanders were invited to follow the quadri-partite procedure for restitution outlined in a document of April 17, 1946, which was intended to enable the Governments of the countries concerned to recover as quickly as possible goods liable for restitution. That procedure is as follows: only claims from the Government of the country or submitted in its name by the diplomatic mission representing that country are receivable, to the exclusion of claims presented by private persons or in their name; these claims are addressed to one or all of the zone Commanders, who take all necessary steps to bring about full restitution.

" The Rules of the United States Military Government in the American Zone of Germany, dated April 15, 1946, provide expressly that claims shall be received by the Office of the Military Government for Germany, and shall be submitted by the claimant nation through the channel of the diplomatic missions; that, in pursuance of such claims, the Office shall take a final decision concerning the validity of each claim and the fact of the seizure by force of the goods claimed; and that, in appropriate cases, it shall then authorize the handing over of the goods claimed.

" (b) Character of the acquisition: The acquisition of the mare by the German body ' Oberste Behörden für Vollblutzucht und

Rennen ' (Supreme Authority for Animal Breeding and Racing) constitutes an act of dispossession within the meaning of the Declaration of London of January 5, 1943. It appears that the plaintiff, a Jew, was deprived of his French nationality by a decree of the Vichy Government of July 23, 1940, and all his goods were sequestrated. On September 20, 1940, one Ferrand was appointed administrator, and, in disposing of the goods of which the plaintiff had been deprived, sold the horses of the stud to which the mare belonged. The defendant claims that there were special circumstances, such as the financial difficulties of the stud in 1940, and the price of 50,000 Reichsmarks paid for eleven thoroughbreds. These circumstances do not deprive the acquisition of the mare of its character of an act of dispossession within the meaning set forth above. . . .

" (c) Applicability of the occupation legislation to the present dispute: The defendant invokes the occupation legislation in his favour. He claims that it is valid not only in Germany, but that it has extraterritorial force and follows the filly in question, which is at present outside the territory occupied. He bases that extraterritorial validity on the fact that the legislative measures taken by the Allied authorities of occupation in virtue of the London Declaration of January 5, 1943, constitute provisions of international law binding on Belgium, which was one of the Signatories of that Declaration. In particular, the defendant contends that the Office of the Military Government of the United States in the American Zone is competent to decide upon the validity of claims submitted by an Allied State, and that that competence excludes the competence of this Tribunal to consider a claim presented by an individual.

" This argument presupposes a hierarchy of different systems of legislation which may be applicable, and the primacy of those which create, on the international plane, a conventional and binding situation. In order to establish that heirarchy and primacy it is necessary to characterize the Declaration of London of January 5, 1943, and to interpret it. The lack of precision of the terminology employed in diplomatic instruments—in this case the very term ' declaration '—means that an instrument cannot on that basis alone be characterized either as a treaty or as a declaration without international binding force.

" The Declaration of London falls into the framework of the provisions of Hague Convention [No. IV] of 1907 concerning the protection of private property. It consists of a solemn warning by the Signatory Powers to all concerned, and in particular to neutral countries, of their intention to do their utmost to defeat the methods of dispossession practised by the enemy, and of the fact that they reserve all their rights to declare invalid those acts of dispossession whatever their form and object. The Signatory Powers record their solidarity 'in this matter'. The solidarity expressed in that warning gives the Declaration the character of a treaty; the Signatory States undertake mutually to defeat the acts of dispossession taken by the enemy, and they warn third parties of that undertaking. On the other hand, the international obligation does not extend beyond that common policy, and the reservation of the right to declare these acts invalid constitutes only one of the means and is mentioned as an example.

"Belgium signed that warning and the undertaking which it contains. That undertaking therefore forms part of the Belgian international legal order. Measures taken for its execution belong either to that order or to Belgian municipal law: the Franco-Belgian Convention of February 23, 1945, to the former; the Decree-Law of January 10, 1941, to the latter. Law No. 52 concerning the blocking and control of goods, and the Directive of the Control Council, constitute measures of execution, by the Supreme Inter-Allied Command and the occupation authorities, of the international obligation assumed in London. That legislation falls within the Belgian conception of international legal order by virtue both of the accession of Belgium to the Declaration of London and of its participation in the occupation of Germany.

"At the same time, the purpose of the [Allied] occupation legislation concerning the recovery of property must be borne in mind. It was designed to facilitate that recovery as far as possible by a speedy procedure which included the establishment of special jurisdictions, and by substantive rules derogating from generally applicable legal provisions. By virtue of the status of the objects to which it relates and of the organization which it establishes, that legislation is strictly territorial in character. In fact, it relates to goods 'taken away by the enemy', transported to within the frontiers of Germany (see the Directive of the Control Council), at present to be found in Germany (Military Government Rule in the British Zone), and subject in Germany to measures of control such as blocking and compulsory declaration. The procedure of recovery is appropriate to an occupation: jurisdiction of the military authorities of occupation and submission of claims through the channel of diplomatic missions accredited to that authority. The short period of limitation is related to an occupation policy, namely, the rapid re-establishment of order in the matter of property rights. The proceedings are not contentious: rights to the goods concerned regularly acquired under German law are disregarded; and only a finding that the goods are liable to restitution according to the definition of the Control Council, is conclusive.

"The accession of Belgium to the Declaration of London and its participation in the occupation merely means that it subscribes to the various measures designed to facilitate the restitution of property of which its nationals were dispossessed during the enemy occupation and which were found again in Germany. This does not exclude rights of recourse under ordinary law for the purpose of claiming, before its tribunals and in conformity with the rules of jurisdiction and of procedure of the *lex fori*, goods found in Belgian territory of which Belgian nationals or aliens were illegally dispossessed.

" To ascribe a territorial character to the occupation legislation in the matter of the recovery of illegally-seized goods accords with the existence of special legislation promulgated by the States signatories of the Declaration of London in conformity with that Declaration, for the purpose of facilitating restitution by judicial means in their own territory. Examples of such legislation are the French Ordinance of April 21, 1945, and the Belgian Decree-Law of January 10, 1941. The various legislative acts have in common the fact that they constitute the projection on the national plane of the Declaration of London.

" There are thus two parallel claims procedures which are different in character and the applicability of which depends on the *situs* of the found object at the time of the submission of the claim. The two categories of claims procedures, without being mutually exclusive, operate on different planes: the administrative, at the instance of Governments, and the judicial, at the instance of any claimant, particularly any individual.

" The property right on which the present claim is based is a civil right. Courts take cognizance of it in accordance with the ordinary rules of competence and procedure. That judicial competence is parallel to the competence of the military authorities, and cannot reasonably be excluded by a more generous and liberal legislation. It co-exists with the occupation legislation in Germany, as it co-exists in Belgium with the administrative measures provided by the Franco-Belgian Convention on the restitution of illegally-seized goods, of February 23, 1945, for the purpose of facilitating the search, identification and preservation of illegally-seized goods, such as the creation of mixed commissions to define the modalities of restitution.

" Accordingly, this Court is competent *ratione materiae* to hear this claim . . ."

2. With regard to the receivability of the action and the question whether it is well founded, the Court said: " The occupation legislation concerning the recovery of illegally-seized goods lays down conditions as to the receivability of a claim, such as submission by the Government of the claiming country and the short period of limitation, and conditions as to the substance, such as the definition of goods eligible for restitution. Neither the accession of Belgium to the Declaration of London nor its participation in the occupation of Germany oblige the Tribunal to apply provisions enacted within

occupied territory with regard to goods illegally seized and found again in Germany.

[The Court then considered which law was applicable to the question whether the defendant had acquired a valid title to the filly. It found that Belgian legislation concerning acts of dispossession was not applicable, since the acts of dispossession in this case had not taken place in Belgium. With regard to the applicability of French legislation concerning acts of dispossession, the Court said:] " The French Ordinance of April 21, 1945, belongs to the category of special laws derogating from generally applicable rules of law. It provides for the payment of compensation for loss or damage, and creates a special legal interest in favour of persons or bodies corporate who have been illegally dispossessed of their goods, property rights or interests. It eliminates obstacles to the recovery of movables existing under generally applicable rules of law, such as possession in good faith. The acts of dispossession to which it relates may have taken place either ' in virtue of the so-called laws, decrees and orders of the *de facto* authority calling itself the Government of France ' or by the hands of the enemy (Article 1). The restoration by the Ordinance of dispossessed persons to their former position is linked to the re-establishment in France of the Republic (*la légalité républicaine*) and the overthrow of the Vichy Government (Ordinance of August 9, 1944). In so far as that Ordinance provides for compensation for loss or damage by reference to the origin of the authority which ordered the acts of dispossession, it has a political basis and accordingly a strictly territorial character. That character is emphasized by the fact that a large number of the beneficiaries of the special legislation had been deprived of French nationality by the Vichy Government and had had their goods confiscated on racial grounds. The rights of these persons were restored by special legislation creating a legally favourable régime for their benefit, as a reply to the political measure of discrimination on racial grounds; as such the special legislation is also political in character. However, even within the framework of the legal community between France and Belgium, such legislation does not cross frontiers."

(3) The filly having been born in the American Zone of Germany, the Court next considered the applicability, as *lex rei sitae*, (a) of occupation legislation in Germany and (b) of German civil law. With regard to the former, the Court said: " With regard to the occupation legislation, there is no point in examining the question whether certain of its provisions are, in their effect on private property, contrary to the Hague Convention [No. IV] of 1907 and whether, from the point of view of the effectiveness of international law, such legislation can be applied by this Court. The rights acquired by German nationals and denied by the Allied Authorities in pursuance of the Declaration of London related to property seized

illegally by the enemy during a belligerent occupation. Such a situation does not fall under the provisions of the Hague Convention, which was intended for the protection of interests properly acquired in the eyes of international law and morality.

" That legislation has previously been analysed. . . . Under it the filly is not liable for restitution, having been born subsequent to the occupation of France, which was where the mare was born. . . ."

The Court accordingly found that German civil law was applicable and that under it the defendant had acquired a valid title to the filly by a purchase in good faith.

[Report: *Pasicrisie belge*, 1955, III, p. 4.]

Belligerent Occupation—Respect for Private Property—Transfer of Property by " Administrator " of Company—Article 46 of the Hague Regulations—Enemy Character of Property—Property Seized by Enemy Company in Violation of International Law.

SOCIÉTÉ ANONYME PNEUMAC *v.* SOCIÉTÉ ANONYME BELGE DU PNEUMATIQUE MICHELIN.

Belgium, Court of Cassation. November 13, 1953.

THE FACTS.—In 1941, during the German occupation of Belgium, an administrator appointed by the German authorities leased to the appellant Company the premises of the respondent Company and transferred to the appellant Company the stock-in-trade of the respondent Company. After the war, the respondent Company sought to obtain full restitution. By a judgment dated January 15, 1952, the Court of Appeal of Brussels held that all finished products, raw materials, or materials in course of production found in the factory or deposited with third parties must be given to the respondent Company, as representing the stock of which it had been deprived or as indemnity therefor.

This was an appeal against that decision. It was contended by the Custodian of Enemy Property, on behalf of the appellant Company, that movable property in the possession of that Company on January 1, 1945, formed part of its sequestrated assets and as such was the common pledge of all its creditors.

Held: that the appeal must be rejected. The appellant Company had not become the owner of the stock of which the respondent Company had been deprived in violation of international law.

The Court said: " The appellant Company acquired the stock-in-trade of the respondent Company as a result of agreements concluded with the administrator in violation of Article 46 of the Rules appended to the Hague Convention of October 18, 1907, and the provisions of the Decree-law of January 10, 1941. These agreements constituted a veritable spoliation of the property of the respondent

Company. This fact excludes the good faith of the appellant Company, which is a condition of its being considered the owner of the contested assets. While Articles 7 and 8 of the Law of December 16, 1851, provide that a debtor must answer for his debts with his entire property, and that the property of a debtor is the common pledge of his creditors, these Articles do not prevent a third party from claiming from the debtor goods which belong to that third party.

"Articles 1 and 8 of the Decree-Law of August 23, 1944, vest in the Custodian of Enemy Property property which is at the disposal of an enemy State or of enemy nationals, even if they do not own the property. However, one cannot consider that property is at the disposal of enemy nationals within the meaning of that Law when it is at their disposal only by virtue of the fact that they arbitrarily dispossessed the owner thereof during the temporary occupation of Belgium by the armies of the enemy State."

[Report: *Pasicrisie belge*, 1954, I, p. 186.]

Belligerent Occupation—Treatment of Private Property—Effect on Compulsory Transfer of Property in Occupied Territory—Declaration of London of January 5, 1943—Invalidity of Transfer—Whether Subsequent Transactions in Enemy Territory Tainted with Invalidity—The Law of Austria.

PURCHASE OF DUTCH PAINTINGS CASE.

Austria, Supreme Court. May 27, 1953.

THE FACTS.—The Declaration of London issued by the Allied Powers on January 5, 1943, stated—in so far as here material—that any compulsory transfer of property occurring in territories under enemy occupation during the Second World War would be invalidated after the conclusion of hostilities. In 1943, after the announcement of the London Declaration, the plaintiff, who was resident in Austria while that country formed part of the German Reich, purchased two Dutch paintings from the defendant, an art dealer also resident in Austria. The defendant himself had purchased the paintings from a museum in Vienna which, in turn, had purchased them in the Netherlands while the latter country was under German occupation. After the end of hostilities the United States occupation authorities in Austria took possession of the paintings for the purpose of restoring them to the Netherlands Government, and the plaintiff thereupon brought this action against the defendant alleging the invalidity of the contract on the ground that the original purchase of the paintings in the Netherlands was void by reason of the fact that the first vendor had been subject to duress resulting from the German occupation of the Netherlands, that each subsequent sale was similarly void and that she, the plaintiff, was therefore entitled to invalidate the contract. On behalf of the defendant it was contended that, irrespective of whether the original sale was void, the transaction between the parties was lawful, and that the action should therefore be dismissed.

Held: that, while the first vendor himself would have been entitled to claim the paintings, the contract between the plaintiff and the defendant was valid, and that the action must therefore be dismissed.

The Court said: " This appeal is ill-founded. It objects to the view of the Court below according to which the contract of sale is not *contra bonos mores*, and contends that the contract is void because the original vendor was acting under the duress of the German occupation of his country at the time when the paintings were purchased. These contentions can only apply to the contract of sale concluded between the Dutch vendor and the [Austrian] museum, and they could only be relied upon in so far as concerns the right of the Dutch vendor to seek the invalidation of the contract concluded between himself and the museum. The present action, however, is based on the alleged invalidity of the contract between the plaintiff and the defendant who has acquired the paintings from the museum. Even if it were proved that the defendant was aware of the circumstances of the contract between the Dutch vendor and the museum, this fact would have no bearing whatever on the validity of the contract between the plaintiff and the defendant. The plaintiff is not entitled to seek the invalidation of a contract of sale concluded between her predecessors in title on the ground that such contract is *contra bonos mores* or is the result of duress. The plaintiff would only be entitled to seek the invalidation of the contract concluded between herself and the defendant if that contract was *contra bonos mores* or if at the time when it was concluded the plaintiff herself had been subject to duress. The fact that by virtue of the Declaration of London contracts of sale concluded between Dutch vendors and German or Austrian purchasers became null and void gives a right only to the Dutch vendor to claim restitution of his property."

The Court then dealt with the question whether the plaintiff was entitled to damages on the ground that the defendant had failed to convey a valid title to her. The claim for damages was dismissed as being out of time, according to the relevant provisions of Austrian law governing the limitation of actions.

[Report: SZ, XXVI (1953), p. 377.]

Belligerent Occupation—Respect for Private Property—Article 46 of the Hague Regulations—Unlawful Requisitions.

See p. 665 (*Transatlantica Transport Maatschappij* v. *Laufer*).

iv.—Inhabitants. Services. Deportations. Hostages

Belligerent Occupation—Inhabitants—Duty of Obedience—Duty to Obey Unlawful Orders—Unlawful Requisition—Article 46 of the Hague Regulations.

TRANSATLANTICA TRANSPORT MAATSCHAPPIJ *v.* LAUFER.
Holland, District Court of Rotterdam. May 29, 1953.

THE FACTS.—In July 1939, Laufer deposited certain furniture with Transatlantica. He subsequently went to England. The furniture remained in storage with Transatlantica until January 1944. On the demand of the German "Sammelverwaltung feindlicher Hausgeräte" (Administration of Enemy Household Effects), Transatlantica handed over these goods to the German occupation authorities, by whom they were taken away. In an action by Transatlantica against Laufer for storage charges, the question arose whether, by parting with the furniture in compliance with the requisition order, the plaintiffs had not broken the contract with the defendant and forfeited the right to recover their charges. Transatlantica contended that the German occupation authorities were entitled to requisition the goods, seeing that Laufer had his residence in London during the war, and that complying with a requisition order was not against the law.

Held: that the claim must be rejected.

The Court said: "The provisions of the Hague Rules on Land Warfare were in force among all the belligerents during the Second World War. Article 46 (which formed part of the third Chapter of these Rules under the title 'De l'autorité militaire sur le territoire de l'Etat ennemi') provides: 'La propriété privée ne peut pas être confisquée.' Even if the German authorities were entitled under international law to requisition Laufer's goods, this would in no way automatically imply that Transatlantica was under an obligation to comply with a requisition order given by a German authority. International law does not impose upon inhabitants of occupied territory any obligation to obey the Occupying Power or to recognize its authority as lawful. Under international law, Transatlantica was free to refuse to hand over the goods."

[Report: *N.J.*, 1955, No. 80.]

Belligerent Occupation—Treatment of Inhabitants—Wrongful Detention of National of Occupied Country—Claim for Damages—Claimant Detained by Official of Occupant *A* Acting on Information received from Official of Occupant *B*—Whether Occupant *A* or Occupant *B* Liable.

WRONGFUL DETENTION (LIABILITY OF OCCUPANT) CASE.

German Federal Republic, Claims Tribunal of Herford. April 28, 1953.

THE FACTS.—Shortly after the occupation of Berlin by the Allies, the claimant was arrested by a non-commissioned officer of the British armed forces. The latter acted on information received from an officer of the Soviet army of occupation, who described the claimant as a suspected war criminal. The claimant was subsequently handed over to the Soviet authorities, who kept him in captivity for a period of approximately five years, at the expiration of which it was found that he had been the victim of a case of mistaken identity. While in captivity, the claimant contracted tuberculosis, and he now claimed damages from the British authorities who, he contended, had arrested him without justification. On behalf of the British authorities, it was contended that as the British non-commissioned officer had acted on information received from the Soviet armed forces he had not acted negligently, and that accordingly the British authorities were not liable.

Held: that, although the claimant had been wrongfully detained, he was not entitled to claim damages from the British authorities, who had acted on information received from another Occupying Power.

The Court said: "Even assuming the evidence of the claimant to be true, it cannot be said that negligence on the part of the British authorities has been established. The latter were obviously requested to arrest a man with the name of the claimant, living at a certain address. The witness (*viz.*, the British non-commissioned officer) was convinced that the right man had, in fact, been arrested. He said that many people had, at that time, assumed false names and procured forged identity papers. The procedure current at that time did not require that the persons who carried out the arrest should undertake an elaborate investigation, including the interrogation of witnesses, concerning the identity of the detainee. It is not for this Tribunal to adjudicate upon the claim which the claimant may possibly have against the Soviet authorities who, if his evidence is accepted as true, detained him, without a previous trial, in a prison or concentration camp from September 5, 1945, until January 27, 1950, and only released him when it was found that he was suffering from a serious illness. Although we must reach the conclusion that the respondent authority in this case is not liable for the sufferings to which the claimant has been subjected, we would nevertheless, if this were possible, recommend that the competent authority consider whether a reasonable *ex gratia* payment can be made to the claimant."[1]

[Report: NJW, 6 (1953), p. 1935.]

C—WARFARE AT SEA

IV.—Prize Law

i.—Nature and Extent of Jurisdiction of Prize Courts

Prize Law—Prize Courts—Jurisdiction of—Whether Postponement of Seizure in Prize Postpones Jurisdiction of Prize Court—Meaning of Seizure or Capture—Distinction between Seizure and Seizure in Prize—Capture of Enemy Port—Whether Includes Capture of Vessels Therein—Whether Shipbuilding Yard a Port—Unfinished Hulls—Whether Subjects of Capture in Prize or to be Regarded as Private Property on Land—Meaning of Unconditional Surrender—Effect on Continuance of Belligerent Rights—German Surrender of May 8, 1945.

SCHIFFAHRT-TREUHAND AND OTHERS *v.* HER MAJESTY'S PROCURATOR-GENERAL.

British Commonwealth, Judicial Committee of the Privy Council sitting in Prize.

(Viscount Simon, Lords Porter, Normand and Cohen.)
January 12, 1953.

THE FACTS.—These were consolidated appeals brought by the respective German owners of the motor vessel *Hermes* and of four hulls in the course of construction, against the decrees of Lord Merriman P.,[2] sitting in prize, condemning these objects as good and lawful prize.

The objects affected by the decrees were as follows. First, there were the hulls 507 and 508, which were under construction at Flensburg at the time of the alleged capture in prize; neither was ready for launching. Secondly, there were hulls 347 and 348 which were lying on the stocks at Lübeck; 347 was ready for launching but had not been painted; 348 was still only partly riveted. Lastly, there was the motor ship *Hermes*, which had been launched but not completely constructed when she suffered bomb damage in Emden harbour; at the time of the alleged capture she was lightly grounded in Emden, damaged, and still incomplete.

In the case of the Flensburg hulls (Nos. 507 and 508) there was the further complication that Flensberg was not captured until

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[1] The Allied High Commission subsequently granted an *ex gratia* payment to the claimant. The legal adviser of the British High Commissioner expressly stated, however, that this payment did not constitute an admission of liability.

[2] See *International Law Reports*, 1951, p. 704, *sub nom. The Hermes and Other Structures*.

May 10, 1945, *i.e.*, two days after the unconditional surrender of the German High Command. It was therefore necessary to decide, in respect of these structures, whether belligerent rights of seizure in prize continued in the period between the surrender and the Allied assumption of supreme authority in Germany on June 5.

Prize proceedings were first instituted in 1947, by which date all the structures had been completed by the claimants acting under the authority of the occupying Power, the Crown paying for the work done. The original proceedings were based on common form affidavits describing in terms of capture what were in effect formal and notional seizures of these objects. It was apparently overlooked by the Crown, however, that capture in prize was not legally possible on dates subsequent to June 5, 1945, when the Allied Powers had assumed powers of government over the whole of Germany. The Crown claim was therefore changed to a contention that the occupation or seizure of the ports of Flensburg, Lübeck and Emden had constituted *ipso facto* the seizure of the five structures found therein; and it was on this basis that the claims came before Lord Merriman P., when he condemned the objects as good and lawful prize.

The owners appealed.

Held: that the structures were rightly condemned as prize. As soon as a ship was seized or captured she became subject to the jurisdiction of the prize court. It was the intention to seize and not an intention to seize in prize that founded the jurisdiction; therefore an intention in the captor to postpone the seizure in prize was irrelevant. An unfinished vessel, captured by or with the assistance of naval forces, was a proper subject of prize, because its completion made it available for war-time use. In the interval between the military surrender of Germany on May 8, 1945, and the assumption by the Allies of supreme authority in Germany on June 5, 1945, there was no need to imply a condition in the surrender that all rights *jure belli* were to be foregone by the victors; accordingly, the Allies remained entitled to seize vessels in prize between these two dates.

Viscount Simon, delivering the judgment of their Lordships, said: " The issues in the appeal are complicated and have been admirably presented and argued before the Board by counsel on either side. Mr. Diplock discussed the questions involved in a different order from that defined by the President and formulated them thus:—(a) Is conscious volition or intention on the part of a captor necessary to constitute capture or seizure in prize? (b) Are structures not capable of floating, such as the Lübeck and Flensburg structures, capable in their nature of being maritime prize? He conceded that the *Hermes* was a ' ship '. (c) Did rights of seizure in prize continue after May 8, 1945, when the act of military surrender was signed at Berlin on behalf of the German High Command? The contention that no seizure in prize was possible after this date affects only Hull 507 and Hull 508, since Flensburg was captured on May 10, 1945.

" Their Lordships find it convenient to deal with the issues raised in the order formulated by Mr. Diplock.

" (a) The form in which the first question is framed implies that the captor who has laid hands on an enemy ship has an option to decide whether to claim her as a prize as from the date of seizure or to use her for his own purposes in the first place with the right to seize her as a prize at a later date. There can be no doubt that this was the assumption made by the Combined Chiefs of Staff of the Allies in reference to captured German ships before the surrender of Germany.

[His Lordship then read an affidavit and an exhibit which had been put in as evidence of the policy followed by the Allies with respect to captured German vessels. He continued:] " The view upon which these directions were framed was therefore that when the Allies took possession of German ports and thereby acquired control of enemy merchant shipping in them, a practical question would arise as to what was to be done with the shipping. On the one hand, the Allies might be glad to use it 'for operational purposes,' for example, to move troops or to bring in supplies. The fact that merchant ships and transports belonging to the Allies had been extensively sunk by German submarines made it all the more necessary to avail themselves of means of sea-transport which fell into their hands.

" On the other hand, the Allied navies might be ambitious of taking the German shipping as prize and thereby contributing to the fund which would be available for prize-bounty. Having, as they conceived, these two alternatives before them, the Joint Chiefs of Staff adopted the policy of recognizing that the first claim on the shipping was for operational use and so informed General Eisenhower and others concerned. But they contemplated that German shipping seized in German ports should in the end be dealt with so as to contribute to the prize funds of the victorious navies. Thus the plan was to use the seized ships in necessary operations as long as the war was going on without being handicapped by the formalities of a Prize Court, but it was contemplated that when Germany surrendered there would still be time to bring the vessels before the Prize Court.

" Those who advised this plan and gave these instructions laboured under the misapprehension that proceedings based on capture in prize, which invoked the jurisdiction of the Prize Court, could be taken after the surrender of Germany. This, in their Lordships' opinion, was an error. And it is now conceded by the Crown that no seizure in prize could validly take place after June 5, 1945.

" Mr. Diplock, relying on the above assumption on which the first question is based and on the view set out above of the Chiefs of Staff, contended that the instructions given by the latter to seize in prize at a later date demonstrated that there had been no seizure in prize at the time of the capture of the ports, and that there could therefore have been no intention on the part of the captors to seize the objects in prize when the ports were captured.

"This argument, however, is met, in their Lordships' opinion, by considering what is the nature of a prize-capture over which the Prize Court has jurisdiction.

"The British Prize Court, constituted at the beginning of any war in which this country is engaged involving naval action, is set up by a Commission under the Great Seal addressed by the Crown to the Admiralty. The Commission under which the Prize Court sat in connexion with the last war was issued under an Order in Council dated September 5, 1939, which recited that a state of war existed between this country and the German Reich 'so that His Majesty's fleets, ships, and aircraft may lawfully seize all ships, vessels, aircraft and goods belonging to the said German Reich or to the citizens and subjects thereof, or other persons inhabiting within any of the countries, territories, or dominions of the said German Reich, and bring the same to judgment in any such courts as shall be duly commissioned to take cognizance thereof,' and the Commission authorized 'the Commissioners for executing the Office of Lord High Admiral to will and require His Majesty's High Court of Justice and the judges thereof for the time being to take cognizance of and judicially proceed upon all manner of captures, recaptures, seizures, prizes and reprisals of all ships, vessels, aircraft and goods that are or shall be taken, and to hear and determine the same, and according to the course of admiralty and the law of nations and the statutes, rules, and regulations for the time being in force in that behalf, to adjudge and condemn all such ships, vessels, aircraft, and goods as shall belong to the said German Reich or to the citizens or subjects thereof, or to any other persons inhabiting within any of the countries, territories, or dominions of the said German Reich or be otherwise condemnable as prize.' The Admiralty then executed this Commission by issuing a warrant to the High Court requiring the judges to act accordingly.

"It is plain, therefore, that the Prize Court has jurisdiction in every case of seizure or capture of a ship alleged to have belonged to the enemy and to decide 'according to the course of admiralty and the law of nations' whether it should be condemned as true and lawful prize. 'Prize' in this connexion, means nothing more than 'taking' or seizure. 'Captured in prize' or 'as prize' is not one species of capture. If a ship is captured she thereby becomes a prize subject to the jurisdiction of the Prize Court. The French equivalent for our 'Prize Court' is Cours des Prises, and 'prises' means 'taking'. Littré defines 'prise' as 'action de prendre un navire'. The jurisdiction of United States courts in prize cases equally extends to all captures, as explained by Judge Story in Notes on the Principles and Practice of Prize Courts. It was pointed out in the course of the argument that, according to Murray's Oxford Dictionary, the English word 'prize' in this sense, though spelt and pronounced in the same way as the word for a reward, is a distinct word and means simply a capture. The first question in every prize case is—was the vessel 'captured' by the captors who demand its condemnation as prize? Similarly, in a claim for 'prize salvage' it is normally essential to prove that the rescued ship had been 'captured' by the enemy. (*The Progress*, (1810) 1 Edw. 210; *The Edward and Mary*, (1801) 3 C.Rob. 305.)

"This view of the matter, which is fundamental to the first and main issue in the case, is supported by the early history of prize jurisdiction. In Roscoe's *History of the English Prize Court*, the author points out how captures of ships when an English king was carrying on a naval war were likely to lead to complaints by neutrals or allies that their ships had been seized, and how the Lord High Admiral was authorized in early days by the Crown to investigate such complaints 'with a delegated authority in the nature of a prize jurisdiction' (*op. cit.*, p. 4). In course of time, a personage called the Admiral's deputy came into existence, who exercised a prize jurisdiction (*Select Pleas of the Crown in the Court of Admiralty*, Vol. I, p. xlii), and by the sixteenth century a rudimentary Prize Court undoubtedly existed (Roscoe, p. 11). The jurisdiction was to decide about 'prizes', *i.e.*, capture of ships. At the time of the Armada, for example, Dr. Julius Caesar, 'doctor of laws, the duly appointed Judge-Lieutenant of the High Court of Admiralty in England' was in 1589 pronouncing sentence of condemnation of a Spanish ship as lawful prize (*Law and Custom of the Sea* (Navy Records Society), Vol. I, p. 254).

"Their Lordships therefore reach the conclusion that the physical capture of a ship is the same thing as taking her in prize, and that a Prize Court has jurisdiction to decide 'according to the course of admiralty and the law of nations' the fate of every vessel so captured. The fact that captors wished or intended to make the vessel a prize at a later date is irrelevant: she became a prize subject to the jurisdiction of the Prize Court from the moment of capture. It is the intention to seize, not the intention to seize in prize, that gives jurisdiction.

"The view of their Lordships that the physical capture of a ship is the same thing as taking her in prize, and that the jurisdiction of the Prize Court arises from the mere fact of seizure, is supported by the language of the Naval Prize Act and by the Prize Rules made thereunder. The rules define 'captor' as meaning 'any person taking or seizing, or having taken or seized, any ship, aircraft or goods as prize'. It is true that section 16 of the Act requires, as a matter of procedure, that every ship taken as prize, and brought into port within the jurisdiction of Prize Court shall be delivered up to the custody of the marshal, or failing him to the principal officer of customs of the port, and section 17 requires the captors 'with all practicable speed' after this to bring the ship's papers into the registry of the court. If the captor seizes a ship and does not oust the jurisdiction of the Prize Court (see *The Zamora*, [1916] 2 A.C. 77, 104, *per* Lord Parker), complaint can be made to it that this has not been done, and the Prize Court will permit those interested in the captured ship to institute proceedings before it and, in an appropriate case, to claim damages from the captor (see *The Remonstrant* (1917), 87 L.J.P.C. 26; 3 B. & C.P.C. 14 and Colombos on *The Law of Prize*, 3rd ed., p. 310). Similarly, once a ship is captured, the Prize Court has jurisdiction to control its requisition, and to make orders to preserve the res.

"When, then, did the capture of these objects take place? Allied forces, with which the British navy co-operated, captured Lübeck on May 2 or 3, and naval forces occupied Flensburg on May 10, 1945. Naval officers were appointed 'to control the ports and the shipping in them' (Admiral Baillie-Grohman's affidavit, para. 5). As a result 'nothing could be done by the Germans with their ships whether they were completed ships or uncompleted ships building in shipyards' (same affidavit, para. 6). 'Capture', said Lord Sumner in *The Pellworm*, [1922] 1 A.C. 292, 302; 38 T.L.R. 388; 3 B. & C.P.C. 1053, 1059, 'consists in compelling the vessel captured to conform to the captor's will. When that is done, *deditio* is complete.' Admiral Baillie-Grohman hoisted his flag at Travemunde, at the mouth of the river on which Lübeck lies, and the entrances there and to Kiel harbour were controlled (paras. 3 and 8). The port of Emden, in which the *Hermes* was lying, was similarly captured and held with the co-operation of the British navy.

"The inevitable conclusion from these facts is that the ships and other objects in the ports were 'captured' at the same time as the ports themselves, just as, in *The Bellaman*, [1948] 2 All E.R. 679, ships aground in Tripoli harbour were regarded as seized when the port of Tripoli was taken. They became, in Lord Parker's phrase in *The Roumanian*, [1916] 1 A.C. 124, 138, enemy goods, seized on enemy territory by the 'naval forces of the Crown'. This is in accordance with Sir W. Scott's view in *The Progress*, 1 Edw. 210, where he observed, in reference to the allegation that the French had captured shipping in the port of Oporto, 'it is not necessary to shew that they had taken "formal possession" of each individual ship, because they had possession of the port itself; and the taking of that which contained the vessels is in effect the same as taking bodily possession of the ships themselves'.

" It may be objected that, if the seizure of a port in such circumstances involves the seizure of enemy ships within it, a ship which is in the port but which belongs to a neutral owner or is otherwise not liable to seizure is none the less seized and made prize. The answer is that this is indeed so, but the captor can put himself right by promptly releasing any vessel against which no claim of condemnation can be validly made (see para. 433 of Oppenheim, Vol. II, 7th ed., p. 868). If there is unreasonable delay in releasing such a vessel, the parties interested have the right to compensation which is awarded by the Prize Court (see Article 64 of the Declaration of London, which, though it was not ratified, embodies this rule).

" To sum up, the fact which gave jurisdiction to the Prize Court is the fact that the ship was physically captured and taken out of the possession of her former owners. It is this fact which constitutes her a prize, and the intention of captors to postpone the date when the Prize Court has jurisdiction is irrelevant.

(b) The next question is whether the Lübeck and Flensburg structures were, at the time of their capture in May, 1945, capable in their then condition and position of being regarded as a res which was subject to capture as prize. As international law has developed, efforts have been made to set limits to the right of belligerents in war to capture property belonging to the enemy or to the enemy's subjects. Originally, no doubt, it was the practice of an army in invasion to seize such property on land and appropriate it and equally for a belligerent navy to capture enemy ships and the like and their cargoes. But the rule soon developed (even though it was not always observed) that it was not legitimate to seize enemy private property on land (unless it was ammunition or arms which could be used against the enemy in fighting) while it remained the law of nations that captures at sea by naval forces were authorized. By 1781 a distinction between land-warfare and maritime-warfare in this respect was recognized (see Lord Mansfield's judgment in *Lindo* v. *Rodney*, in a note to *Le Caux* v. *Eden*, (1781) 2 Doug. 594, 613.)

" The explanation of this difference may well be found in the fact that merchant-shipping is used in war for purposes of transport; so long as it belongs to the subjects of the enemy, it adds to his strength, while the capture of merchant shipping at once reduces the enemy's power and adds to the power of the belligerent and hence becomes a legitimate operation of war. Moreover, merchant-shipping, unlike property on land, is usually found on the high seas, which belongs to no particular nation. Cargoes belonging to, or destined for, the enemy (unless protected by the Declaration of Paris) are subject to capture by a belligerent for the same reason. The rule prohibiting the seizure by a belligerent of enemy property on land is now formulated in Hague Convention No. IV, dealing with the Laws and Customs of War on Land, drawn up in 1899 and revised in 1907, Article 46 of which provides that ' private property cannot be confiscated'. This must be understood to refer to private property which does not consist of war material or means of transport serviceable for military operations (Oppenheim, Vol. II, 7th ed., para. 143); to capture and confiscate other private property in the course of land warfare would be pillage, and this is formally prohibited by Article 47. Articles 52 and 53 deal with requisitions, and the latter Article, as revised in 1907, contains the paragraph: 'All appliances, whether on land, at sea, or in the air, adapted for . . . the transport of persons or goods apart from cases governed by maritime law, depôts of arms, and, generally, all kinds of war material may be seized, even though belonging to private persons, but they must be restored and indemnities for them regulated at the peace.'

"The phrase 'apart from cases governed by maritime law' marks the divergence between the rules of war on land, which prohibit capture of private enemy property, and the rules governing sea warfare which permit prize-capture. On which side of the dividing line do the Flensburg and Lübeck structures fall? There is no authority or decided case exactly in point, and their Lordships agree with the President that the question whether the capture of any particular property is a justifiable means of coercion must be tested as a matter of principle. To use Lord Mansfield's phrase, it is necessary to consider 'the reason of the thing'. Dana's note to Wheaton, 8th ed., p. 451, under the heading of 'Distinction between Enemy's Property at Sea and on Land', contains the following passage: 'Where private property is taken, it is because it is of such a character or so situated as to make its capture a justifiable means of coercing the power with which we are at war. If the hostile power has an interest in the property which is available to him for the purposes of war, that fact makes it prima facie a subject of capture. The enemy has such an interest in all convertible and mercantile property within his control, or belonging to persons who are living under his control, whether it be on land or at sea. . . . The humanity and policy of modern times have abstained from the taking of private property, not liable to direct use in war, when on land.'

"Applying this test, it would seem to follow that an unfinished ship in course of construction can be a proper subject of prize, at any rate when captured by or with the assistance of naval forces, for its completion makes it available for wartime use. Their Lordships agree with the President that these structures, though not capable of floating at the time they were captured, are none the less to be regarded as 'maritime property in a maritime town' and are rightly to be regarded as maritime prize.

(c) The third and last question in the appeal affects only Hull 507 and Hull 508, which were under construction in the port of Flensburg when it was occupied by a detachment of the British army and by British naval forces on May 10, 1945. The appellants submitted that the seizure of these vessels was invalid because seizure in prize is an act of hostility, and because all hostilities were brought to an end on May 8, 1945, by the Act of Military Surrender signed at Berlin on that date on behalf of the German High Command in the presence of officers representing the Supreme Commander of the Allied Expeditionary Force and the Supreme High Command of the Russian Army. The Crown's submission is that the right to seize in prize persisted till June 5, 1945, when the Governments of the United Kingdom, the United States of America and the Union of Soviet Socialist Republics, and the Provisional Government of the French Republic by a declaration signed at Berlin by their representatives declared that they assumed supreme authority with respect to Germany, including all the powers possessed by the German Government, the High Command and any state, municipal and local government. That declaration admittedly brought to an end all hostilities between the allied powers and the German State, and it terminated the right of seizure, because thenceforward all German ships and maritime property were at the disposal of the allied powers as the supreme governing and legislative authority of the Reich. The decision of the President was that, though the victors might expressly and impliedly abrogate any rights that they may have *jure belli*, including rights of prize, he saw no reason for holding that the Crown had lost those rights because of anything which occurred before the declaration of June 5, 1945.

" The Act of Military Surrender of May 8, 1945, by which the High Command surrendered unconditionally all forces on land, at sea and in the air which were at this date under German control is unprecedented and there is no legal decision of the courts of the United Kingdom, nor indeed of any foreign court, which defines the consequences in relation to the victor's right of prize. The appellants therefore, in default of more direct authority, sought to base an argument on precedents which define the effects of a general armistice. The argument was summarized by the President as follows: ' It is at the very least doubtful whether the exercise of belligerent rights in prize is permitted during an armistice, unless they are expressly reserved; and, seeing that an armistice is a mere suspension of hostilities, so much the less can the exercise of these rights be permissible after a total surrender, which involves an absolute cessation of hostilities.' This was in substance the argument presented to their Lordships.

" The argument is beset by the weakness which attends all arguments from analogy. A general armistice is the result of a negotiation in which detailed consideration is normally given to the conduct during the armistice of the armed forces of both parties, and it frequently includes as one of its terms a provision dealing with the right of seizure in prize. When that is done the agreed term regulates the right. But when there is no term in the armistice dealing with the right, then it is a question whether a provision should be implied that the right of prize is suspended, and that question will depend on the special circumstances, the practice, or it may be better to say the tendency, of the courts varies in different countries. In France, for example, the tendency is to hold that the right of prize is suspended (see The *Santa Flavia, Prises Maritime,* Jurisprudence Française de la Guerre 1939–45, p. 421). The German and Italian courts in obedience to their own municipal legislation have taken a contrary view. There is, however, no doubt that during a general armistice the right of visit and search and the right to seize contraband and neutral vessels attempting to run a blockade are not suspended. Their Lordships are of opinion that if these rights can be exercised against neutrals, *a fortiori* the British courts would recognize the right of seizure of enemy ships. All these rights find their justification in the prevention during the armistice of the enemy's replenishment of his resources and of the increase of his warlike potentiality. If that be the sound view, the supposed analogy between a general armistice and an unconditional surrender turns against the appellants.

" But the absolute surrender of all existing military forces is not truly analogous to a general armistice, and provisions regulating the conduct of the victor's forces find no place in it and are, indeed, incompatible with it. It may not be correct to describe such a surrender as a unilateral act of the vanquished enemy, for, to take the present instance, the surrender was received by the victor as an acceptance of terms which he might impose. Article 4 of the Act of Surrender of May 8, 1945, expressly provided that it should be 'without prejudice to, and will be superseded by any general instrument of surrender imposed by, or on behalf of the United Nations'; and the Berlin Declaration of June 5, 1945, was in fact the general instrument of surrender contemplated by that article. In the interval between May 8 and June 5 it would of course have been contrary to international law and the dictates of humanity to attack submissive and unresisting officers and men of the German forces, and it would not be incorrect to say that abstention by the victor from acts of that kind was an inherent condition of the surrender. But there is no necessity to imply a condition that all rights jure belli were to be forgone by the victor. The Allies were, for example, fully entitled to order their forces to advance further into German territory, and their Lordships have no doubt that they remained entitled to seize German vessels on the high seas in prize.

" There are two specialities of the situation as it stood on May 8, 1945, which provide additional and independent grounds for this conclusion. The first is that there was on May 8 no surrender of the German Government or of the Reich itself. The appellant's case is that the victor's rights as a belligerent were immediately replaced by rights of subjugation. Such an instantaneous transition is scarcely practicable even when it is the enemy government that surrenders. But there was a German Government still in existence on May 8, and it was entitled to raise new forces, to dismiss the existing High Command, to appoint new military leaders with instructions to continue the struggle. A prolonged resistance after the defeat of the German armies had often been threatened by German leaders, and on May 8 it could not have been said that the resistance of the Reich was finally at an end. It is significant that the Berlin Declaration of June 5, 1945, instead of proceeding merely on the narrative that the German armed forces had surrendered, narrates also that Germany was no longer capable of resisting the will of the victorious Powers, and that the unconditional surrender of Germany had thereby been effected. By June 5 the chief members of the German government had been arrested, and the passive submission of Germany to the will of the victors had become an accomplished fact. It was therefore the Declaration of Berlin that terminated all hostilities and ended the right of seizure.

"The other matter is that Germany had been waging war in alliance with the Japanese Empire, and that the war with Japan continued after the surrender of the German armed forces. Their Lordships agree with the Crown's submission that when war is carried on by parties as allies the unconditional surrender of one cannot protect it against the right of seizure so long as active hostilities are continued by a partner, unless the victor consents to abrogate his right.

"Their Lordships do not find it necessary to consider the opinions of writers on the effect of the unconditional surrender of Germany's armed forces on the right to seize in prize. No author was cited who had had before his mind the precise state of affairs between the surrender on May 8, 1945, and the Berlin Declaration of June 5, 1945, or the distinction between a surrender by the High Command and the surrender of the Reich, or the effect of the continuance of the war by Germany's ally, Japan.

"Their Lordships find themselves in agreement with the opinion of the President that the victor may abrogate his rights *jure belli*, including rights of prize, not only by an express renunciation, but also impliedly by his conduct, and they would add that there may be circumstances in which unreasonable delay after an unconditional surrender in regulating the situation by a new declaration or arrangement may have a prejudicial effect on the victor's retention of his rights. Their Lordships, therefore, hold that the condemnation as good and lawful prize pronounced by the Prize Court was correct and will humbly advise Her Majesty that this appeal should be dismissed. The conclusion at which their Lordships have arrived renders it unnecessary to decide the fourth question formulated by Lord Merriman."

[Report: L.R. [1953] A.C. 232.]

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